No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-12a) is reported at 577 F.2d 372. The memorandum opinion of the district court (App. D, *infra*, 15a-23a) is reported at 423 F. Supp. 537.

JURISDICTION

The judgment of the court of appeals (App. B, *infra*, 13a) was entered on June 12, 1978. A petition for rehearing was denied on August 7, 1978 (App. C, *infra*, 14a). On October 26, 1978, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including November 16, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may obtain collateral relief from his conviction under 28 U.S.C. 2255 solely because the district court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

At the time of respondent's guilty plea, Rule 11 of the Federal Rules of Criminal Procedures provided:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty, and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequence of the plea.

Rule 11 now provides in pertinent part:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right

to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and

(4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT

1. A 19-count indictment filed in the United States District Court for the Eastern District of Michigan charged respondent and 21 co-defendants with conspiracy to manufacture and distribute, and to possess with intent to distribute, heroin, cocaine, LSD, and other controlled substances, in violation of 21 U.S.C. 846, and with various substantive narcotics offenses, in violation of 21 U.S.C. 841(a)(1) and 843(b). On May 24, 1974, pursuant to a plea bargain whereby the remaining charges against him would be dismissed and the government would not prosecute him for a bail violation, respondent offered to plead guilty to the conspiracy count of the indictment.

At the outset of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Proce-

dure, the prosecutor disclosed the existence and terms of the plea agreement (Tr. 2-3).[1] The district court then questioned respondent and determined that he was not suffering from any physical or mental impairment, that he was fully aware of what he was doing, and that he understood the constitutional rights that he would waive by pleading guilty (Tr. 4-7). The court informed respondent that he could be sentenced to a maximum of 15 years' imprisonment and a $25,000 fine if the plea were accepted,[2] but it failed to mention that respondent would also

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[1] "Tr." refers to the transcript of the May 24, 1974, Rule 11 proceeding. "H." refers to the transcript of the September 8, 1976, hearing on respondent's motion to vacate his guilty plea.

[2] The pertinent colloquy was as follows (Tr. 7-8):

THE COURT: Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

THE DEFENDANT: No, sir.

THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?

THE DEFENDANT: I have now, yes.

THE COURT: Now you know?

THE DEFENDANT: Yes, sir.

* * * *

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.

RESPONDENT: Yes, sir.

THE COURT: You understand that?

RESPONDENT: Yes, sir.

be subject to a mandatory special parole term of at least three years.[3]

After the court outlined the nature of the charges, respondent explained his involvement in the conspiracy and confessed to his guilt (Tr. 9-14). Respondent acknowledged that he had not been forced or threatened to plead guilty and that no promises had been made in exchange for the plea other than those contained in the plea bargain (Tr. 15). Respondent's counsel advised the court that he was satisfied that there was a factual basis for the plea and that respondent knew "full well the consequences of a guilty plea * * *" (Tr. 15-16). The court then accepted

[3] Section 401(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. 91-513, 84 Stat. 1260, 21 U.S.C. 841(b), provides that persons convicted of a violation of the Act be given a term of "special parole," in addition to any other sentence imposed. The special parole term, which must be at least two, three, or four years in length (depending on the nature of the offense) and which may be as long as life (see, *e.g.*, *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Rivera-Marquez*, 519 F.2d 1227, 1228-1229 (9th Cir.), cert. denied, 423 U.S. 949 (1975); *United States* v. *Rich*, 518 F.2d 980, 987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976)), "is separate from and begins *after* the usual sentence terminates, including any period of supervision. In the event an individual should violate during the period of supervision prior to the beginning of the SPT [Special Parole Term], he will be returned as a violator of the basic period of supervision with the SPT still to follow unaffected." Bureau of Prisons Policy Statement 7500.43 at 2 (January 18, 1973). If a defendant violates the conditions of special parole, he is returned to prison to serve the entire special parole term, not merely the unexpired portion. 21 U.S.C. 841(c).

respondent's plea of guilty, finding that the plea was entered voluntarily with a full understanding of its possible consequences and was supported by a factual basis (Tr. 16). Thereafter, on September 19, 1974, respondent was sentenced to 10 years' imprisonment, to be followed by five years' special parole, and a $5,000 fine.

2. Respondent did not appeal. Approximately two years after sentencing, on August 10, 1976, respondent moved to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that the district court had violated Rule 11, Fed. R. Crim. P., by failing to inform him of the mandatory special parole term at the time his plea was entered. The motion did not assert that respondent had actually been unaware of the special parole provision or that, if he had been notified of it by the trial judge, he would not have pleaded guilty.

The district court held a hearing on respondent's Section 2255 motion on September 8, 1976. At the hearing, respondent's counsel stated that he could not recall whether he had discussed the special parole term with respondent prior to entry of his guilty plea (H. 6-7), but he did acknowledge that, before a client pleaded guilty, it was his practice to review with the client the possible sentence that could be imposed (H. 7). Counsel also admitted that he had represented to the court at the Rule 11 proceeding that respondent was fully aware of the consequences of his plea (H. 10).

The district court denied respondent's motion to vacate sentence. Although it agreed that the record of the guilty plea proceeding did not reflect that respondent had been told of the mandatory special parole provisions (App. D, *infra*, 16a), the court concluded that respondent had not been prejudiced by the omission and that he therefore was not entitled to collateral relief from his conviction. The court observed that respondent's total sentence did not exceed the maximum sentence that he was informed he could receive as a result of his guilty plea (*id.* at 18a). In addition, the court found that respondent's plea had been voluntarily entered and that the technical defect had not resulted in any fundamental unfairness (*id.* at 22a & n.3).

3. The court of appeals reversed and remanded with instructions to vacate the sentence entered upon the guilty plea and to allow respondent to plead anew. Finding that the district court's ruling was "squarely contrary" to *United States* v. *Wolak*, 510 F.2d 165 (6th Cir. 1975), the court of appeals held that the mandatory special parole term was a direct consequence of a guilty plea, that the district court had therefore violated Rule 11 in failing to advise respondent of that consequence of his plea, and that (relying on *McCarthy* v. *United States*, 394 U.S. 459 (1969)) the proper remedy for such noncompliance was to allow respondent to withdraw the plea (App. A, *infra*, 1a-2a).

The court recognized (App. A, *infra*, 10a) that *McCarthy* involved a *direct* appeal from a conviction

entered upon a guilty plea and that this Court had subsequently remarked in *Davis* v. *United States*, 417 U.S. 333 (1974), that the failure to comply with the formal requirements of a rule of criminal procedure does not warrant *collateral* relief absent a showing of " 'a fundamental defect which inherently results in a complete miscarriage of justice' " (417 U.S. at 346, quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). It further acknowledged that "at first blush the Rule 11 violation at issue here did not seem to rise to the level" required to satisfy the *Davis* test (App. A, *infra*, 9a). The court resolved the conflict by holding that prejudice inheres in every failure to comply with Rule 11 and that such claims are therefore cognizable in a Section 2255 proceeding (*id.* at 10a). The court concluded (*id.* at 10a-11a; footnote omitted):

> We reconcile *McCarthy* and *Davis* by holding that a Rule 11 violation is per se prejudicial and thus must be a "fundamental defect which inherently results in a complete miscarriage of justice." We feel that any other reconciling of the two cases which emphasizes *Davis* over *McCarthy* should come only from the Supreme Court.

REASONS FOR GRANTING THE PETITION

The court of appeals' holding that a defendant may collaterally attack his conviction, years after the entry of his guilty plea, merely because the district court failed to comply precisely with the requirements

of Rule 11 of the Federal Rules of Criminal Procedure departs significantly from this Court's construction of the scope of relief under the federal habeas corpus statute (28 U.S.C. 2255) and conflicts with the rulings of several other circuits. Moreover, the decision of the court below is of great practical importance because of its broad implications for the finality of judgments in large numbers of federal criminal cases. Guilty pleas form the basis for the substantial majority of federal convictions, and Rule 11 requires the district courts to comply with a series of procedures, many of which are unnecessary to a determination of voluntariness, prior to accepting such pleas. The court of appeals' virtual elimination of the requirement that there be a showing of prejudice before a violation of Rule 11 may lead to collateral relief will invite defendants to attack pleas that were knowingly and voluntarily entered, in the hope that reprosecution would be difficult or impossible.

1. In *McCarthy* v. *United States*, 394 U.S. 459, 472 (1969), the Court held that "a defendant whose plea has been accepted in violation of Rule 11 [of the Federal Rules of Criminal Procedure] should be afforded the opportunity to plead anew * * *." The court of appeals assumed that this ruling, announced in the context of a direct appeal, was equally applicable to collateral review and that respondent would therefore be entitled to vacate his conviction under 28 U.S.C. 2255 if the record of his guilty plea proceeding substantiated his contention that the district

court had violated Rule 11. Since the court below found that respondent had not been informed of the mandatory special parole term, which unquestionably is a "consequence of the plea,"[4] it concluded that he must be afforded the opportunity to plead anew (App. A, *infra*, 4a).

This decision ignores the essential distinction between direct and collateral attacks upon a conviction. Because of the "strong interest in preserving the finality of judgments," *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977), the crucial question in a pro-

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[4] Respondent's guilty plea was entered under the 1966 version of Rule 11, which required the district court to determine that the defendant understood "the consequences of the plea." Effective December 1, 1975, Rule 11(c)(1) was amended to require the court, before accepting a plea of guilty or nolo contendere, to inform the defendant on the record of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law * * *." This change was intended to eliminate confusion over what is a direct "consequence" of a guilty plea. As the Advisory Committee remarked, "[t]he objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentences and also the longest possible sentences for the offense to which he is pleading guilty." 62 F.R.D. 271, 279 (1974). Hence, we do not dispute that failure to notify a defendant pleading guilty to a controlled substance offense of the mandatory special parole term would constitute a violation of the new Rule 11. See *United States* v. *Del Prete*, 567 F.2d 928, 929 (9th Cir. 1978). But see *United States* v. *Adams*, 566 F.2d 962, 969 (5th Cir. 1978).

ceeding under Section 2255 is not whether an error may have been committed, as would be the case on direct review, but whether the "resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). Thus, merely because the district court's failure to comply with the requirements of Rule 11 might have permitted respondent to withdraw his plea if the defect had been raised on direct appeal, it does not follow that the same relief should be available on a motion to vacate sentence. The appropriate inquiry at that point concerns not whether "errors of law [were] committed by the trial court" but whether the defendant's confinement offends the Constitution. *Sunal* v. *Large*, 332 U.S. 174, 179, 181-182 (1947).

The Court emphasized this important distinction in *Hill* v. *United States*, 368 U.S. 424, 426 (1962), which presented the question "whether a district court's failure to afford a defendant an opportunity to make a statement at the time of sentencing furnishe[d], without more, grounds for a successful collateral attack upon the judgment and sentence." Although the right of allocution was expressly guaranteed to a defendant by Rule 32(a), Fed. R. Crim. P., and was deemed to be an ancient and valuable one (*Green* v. *United States*, 365 U.S. 301, 304 (1961)), and although a violation of Rule 32(a) necessitated reversal of the conviction if raised on direct appeal (*Van Hook* v. *United States*, 365 U.S. 609 (1961)), the Court denied relief under Section 2255, holding that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 368 U.S. at 429. The Court explained (*id.* at 428):

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of habeas corpus. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27.

See also *Davis* v. *United States*, 417 U.S. 333, 346 (1974); *Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976); *Sunal* v. *Large*, *supra*, 332 U.S. at 178-179.

By the same token, the district court's failure to follow the formal requirements of Rule 11 should not entitle a defendant to relief on collateral attack unless he was prejudiced by the violation. Where, as here, the violation relates to the trial judge's failure to notify the defendant of the mandatory special parole provisions, prejudice could be demonstrated by a showing that the defect in fact rendered the guilty plea involuntary (for example, if the defendant would not have pleaded guilty had he been aware of the special parole term)[5] or that it would be manifestly

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[5] A conviction entered upon an involuntary plea of guilty is subject to collateral attack. See *Fontaine* v. *United States*, 411 U.S. 213 (1973); *Machibroda* v. *United States*, 368 U.S. 487 (1962).

unfair, in light of the absence of an express warning about special parole, to hold him to his plea[6] (for example, if the sentence imposed, with the addition of the period of special parole, exceeded the maximum sentence that the defendant was told he could be given).[6] See *Del Vecchio* v. *United States*, 556 F.2d

[6] In that circumstance, of course, the appropriate remedy under Section 2255 may well be to reduce the defendant's sentence to comport with the information he received at the time of his plea. See *Richardson* v. *United States*, 577 F.2d 447, 452 (8th Cir. 1978), petition for cert. pending, No. 78-5263.

Contrary to the court of appeals' assumption (App. A, *infra*, 9a), there is no tension between the standards for collateral relief articulated in *Hill* and *Davis* and the prophylactic rule announced in *McCarthy* for noncompliance with Rule 11. *McCarthy*, it bears repeating, was a direct appeal, and the Court emphasized that its decision was "based solely upon our construction of Rule 11 and our supervisory power over the lower courts," rather than upon the Constitution (394 U.S. at 464). Moreover, although the Court remarked that "prejudice inheres in a failure to comply with Rule 11" (*id.* at 471), it did not suggest that such prejudice—which was defined merely as "depriv[ing] the defendant of the Rule's procedural safeguards" (*ibid.*)—was of a magnitude that would entitle a defendant to habeas corpus relief. Indeed, strong evidence that the Court did not consider every plea entered in violation of Rule 11 to be fundamentally unfair is offered by its decision not to apply *McCarthy* retroactively (*Halliday* v. *United States*, 394 U.S. 831 (1969)) and by the distinction it carefully drew between the remedies available for a violation of the Rule and for an involuntary guilty plea (*id.* at 833):

> A defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction.

106, 111 (2d Cir. 1977); *Bachner* v. *United States*, 517 F.2d 589, 597 (7th Cir. 1975).

Respondent's allegations satisfied neither of these tests. His motion to vacate sentence did not allege that he was actually unaware of the special parole provisions, much less that he would not have pleaded guilty if he had been fully informed of the consequences of his plea,[7] and the district court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea bargain (App. D, *infra*, 22a).[8] Moreover, as

[7] Although the memorandum of law submitted in support of respondent's Section 2255 motion stated that "[d]efendant did not know of the mandatory special parole term" (p. 4), this allegation, unlike the contents of the motion, was not verified, and respondent did not offer to submit an affidavit to support the assertion. The allegation was suspect, in any event, in light of counsel's representation at the Rule 11 proceeding that he had explained to respondent the consequences of his plea (Tr. 16). See also H. 7.

[8] The district court remarked (H. 16): "I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, 'You will be subjected to a parole term of at least three years,' as far as his guilty plea is concerned." The court of appeals did not disturb this fact finding, which is amply supported by the record. As the Seventh Circuit has observed:

> Unlike ineligibility for parole, which 'automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances,' the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole. It would be unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it

the district court noted (*id.* at 18a), respondent's sentence of 10 years' imprisonment and five years' special parole was no greater—indeed, was materially less, for all practical purposes—than the 15 years' imprisonment that he was advised he could receive if he pleaded guilty.

2. In these circumstances, with no finding that the district court's technical noncompliance with one aspect of Rule 11 rendered respondent's plea either involuntary or so unfair as to be "a complete miscarriage of justice," there are substantial reasons why claims such as respondent's should not be cognizable on collateral attack. To begin with, this is not a case in which "the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Hill* v. *United States*, *supra*, 368 U.S. at 428. A trial judge's failure to mention the mandatory special parole term during the Rule 11 proceeding normally will be immediately apparent to the defendant upon imposition of sentence, especially if his ignorance of the special parole requirement truly played a meaningful role in his decision to plead guilty. When the period of special parole is announced, the defendant should be instantly aware, if it is true, that he has been given

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would be to assume that he would be influenced by other contingencies he is not advised about.

Bachner v. *United States*, *supra*, 517 F.2d at 597 (citation omitted). See also *id.* at 598-599 (Stevens, J., concurring); *Johnson* v. *Wainwright*, 456 F.2d 1200, 1201 (5th Cir. 1972) (likelihood that district court's mention of parole term would cause a defendant to change his decision to plead guilty "is so improbable as to be without legal significance").

a more severe sentence than he anticipated could be imposed. It is not unreasonable to hold that the remedy in that situation should be a timely motion to withdraw the plea under Fed. R. Crim. P. 32(d) or a direct appeal of the conviction.[9]

Furthermore, allowing a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceedings for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution on the underlying offenses may be difficult or impossible. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13. *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir.), cert. denied, 374 U.S. 857 (1963). As the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

Here, for example, it should have been obvious to respondent (and his counsel) at sentencing that the

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[9] Even on direct appeal, of course, it is arguable that the harmless error rule of Fed. R. Crim. P. 52(a) should be applied to inconsequential Rule 11 violations. See *United States* v. *Scharf*, 551 F.2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F.2d 962, 966 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977). But see, *e.g.*, *United States* v. *Palter*, 575 F.2d 1050 (2d Cir. 1978); *United States* v. *Clark*, 574 F.2d 1357 (5th Cir. 1978).

trial judge had neglected to mention the special parole requirement during the Rule 11 proceeding. Yet respondent's unexplained delay of almost two years in raising his objection will, if the court of appeals' decision is not overturned, require the government to reprosecute a complicated conspiracy case long after the occurrence of the criminal conduct, a task made especially burdensome by the fact that respondent's plea allowed him to avoid trial with his co-defendants. See *United States* v. *Barker*, 514 F.2d 208, 222 (D.C. Cir. 1974) (en banc), cert. denied, 421 U.S. 1013 (1975).[10]

These important concerns would be seriously undermined if every violation of Rule 11, no matter how inconsequential, justified Section 2255 relief. Indeed, the problem will be exacerbated by the 1975 amendments to the rule, which expand substantially the range of subjects on which a trial judge must advise a defendant before accepting his guilty plea. See Fed. R. Crim. P. 11(c)(1)-(5).[11] More than 80% of all federal criminal convictions follow pleas

[10] Twenty-two defendants were indicted in this case; 11, including respondent, pleaded guilty; five defendants were found guilty by a jury.

[11] Courts have recently found Rule 11 violations, for example, in the trial judge's failure to address the defendant personally (*United States* v. *Hart*, 566 F.2d 977 (5th Cir. 1978)) or to advise the defendant "that if he pleads guilty * * * the court may ask him questions about the offense * * * and if he answers these questions under oath * * * his answers may later be used against him in a prosecution for perjury" (*United States* v. *Journet*, 544 F.2d 633 (2d Cir. 1976); see also *United States* v. *Boone*, 543 F.2d 1090 (4th Cir. 1976)).

of guilty,[12] and minor deviations from Rule 11 are inevitable in a not insignificant percentage of these cases. The strong societal interest in the finality of judgments suggests that, unless a violation of the rule materially influenced the defendant's decision to plead guilty, it should be raised on direct appeal or not at all.

3. As the court of appeals acknowledged (App. A. *infra*, 5a-7a), the circuits have disagreed sharply over the availability of Section 2255 relief for mere violations of Rule 11. Along with the Sixth Circuit, three courts—the First,[13] Third,[14] and Ninth Circuits[15]—have held that a defendant who was not informed of the mandatory special parole term at the

[12] In fiscal year 1977, 35,335 of the 43,248 federal convictions, or 81.7%, followed pleas of guilty. In fiscal year 1976, the figures were 33,327 out of 40,975, or 81.3%. Source: *1977 Annual Report of the Director of the Administrative Office of the United States Courts*, Table 38 at p. 143.

[13] *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975). But cf. *United States* v. *Tursi*, 576 F.2d 396 (1st Cir. 1978), denying a motion to vacate a guilty plea entered under the 1966 version of Rule 11 because the defendant had not been told that the plea would waive his privilege against self-incrimination.

[14] *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974). In *Horsley* v. *United States*, No. 77-2297 (3d Cir. Aug. 28, 1978), the court purported to adopt the *Hill* and *Davis* standard but held that the failure adequately to inform the defendant of the nature of the charges against him was "inherently prejudicial" (slip op. 8).

[15] *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977). See also *Yothers* v. *United States*, 572 F.2d 1326 (9th Cir. 1978); *Sanchez* v. *United States*, 572 F.2d 210, 211 (9th Cir. 1977).

time of his guilty plea is entitled to attack his conviction collaterally, regardless of whether the error actually influenced his plea or otherwise rendered its continued validity inequitable.

On the other hand, five courts—the Second,[16] Fourth,[17] Seventh,[18] Eighth,[19] and Tenth Circuits[20]—have denied collateral relief in identical circumstances, holding that technical violations of Rule 11 may not be raised under Section 2255 and that the standard announced in *Hill* and *Davis* requires a case-by-case determination whether the failure to advise a defendant of the special parole requirement has resulted in a "complete miscarriage of justice."

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[16] *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977). The court of appeals initially followed an automatic reversal rule in *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975), but in *Del Vecchio* it reconsidered its position in light of *Davis*.

[17] *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), cert. denied, 424 U.S. 918 (1976). See also *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978).

[18] *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975).

[19] *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977). See also *Schriever* v. *United States*, 553 F.2d 1152 (8th Cir. 1977); *United States* v. *Kattou*, 548 F.2d 760 (8th Cir. 1977); *United States* v. *Ortiz*, 545 F.2d 1122 (8th Cir. 1976); *United States* v. *Rodrigue*, 545 F.2d 75 (8th Cir. 1976). Like the Second Circuit, the Eighth Circuit's current view represents a change in position. See *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).

[20] *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), cert. denied, 434 U.S. 834 (1977). See also *United States* v. *Eaton*, 579 F.2d 1181 (10th Cir. 1978); *Evers* v. *United States*, 579 F.2d 71 (10th Cir. 1978).

The Fifth Circuit also has rejected a collateral attack by a defendant who was not advised of the mandatory special parole term (*Johnson* v. *United States*, 542 F.2d 941 (5th Cir. 1976), cert. denied, 430 U.S. 934 (1977)), but it has subsequently ruled in cases not involving the special parole provisions that any failure to comply with the requirements of Rule 11, whether or not prejudicial, warrants Section 2255 relief.[21] Finally, the District of Columbia Circuit has noted the conflict among the circuits on this issue but has declined to side with either group, holding instead that all attempts to withdraw a guilty plea, no matter how long after conviction and regardless of the circumstances, must be brought under Fed. R. Crim. P. 32(d) and judged under that rule's "manifest injustice" standard, rather than under Section 2255. *United States* v. *Watson*, 548 F.2d 1058 (D.C. Cir. 1977).

In sum, we agree with the following remark of the court of appeals (App. A, *infra*, 11a n.16):

> Given the frequency with which this issue arises and the severe split among the circuits, hopefully the Supreme Court will resolve this issue in the near future. Every circuit * * * has expressed its position on this issue which is at the heart of the administration of the federal

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[21] See *Keel* v. *United States*, 572 F.2d 1135 (5th Cir.), rehearing en banc granted, 572 F.2d 1137 (1978); *Coody* v. *United States*, 570 F.2d 540 (5th Cir.), rehearing en banc granted, 576 F.2d 106 (1978). See also *Howard* v. *United States*, 580 F.2d 716 (5th Cir. 1978); *Sassoon* v. *United States*, 561 F.2d 1154, 1160 (5th Cir. 1977); *Canady* v. *United States*, 554 F.2d 203 (5th Cir. 1977).

drug laws in particular (the effect of 21 U.S.C. § 841 (b)) and all federal criminal laws in general (the scope of § 2255 relief after *Davis*).

The Court should accept this invitation to resolve an important and disputed question of federal criminal law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1978

APPENDIX A

No. 77-1572

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CHARLES TIMMRECK, *Petitioner-Appellant*,

v.

UNITED STATES OF AMERICA, *Respondent-Appellee.*

APPEAL from the United States District Court
for the Eastern District of Michigan.

Decided and Filed June 12, 1978.

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

CELEBREZZE, Circuit Judge. This is yet another case involving a 28 U.S.C. § 2255 motion to vacate a sentence entered upon a guilty plea taken in violation of Federal Rule of Criminal Procedure 11. We reaffirm this circuit's position requiring strict adherence to Rule 11 and allowing deviation therefrom to be challenged in a § 2255 proceeding. We reverse the district court's denial of relief.

Charles Timmreck entered a plea of guilty to conspiracy to distribute a controlled substance, 21 U.S.C.

§ 846, on May 24, 1974, pursuant to a plea bargain which resulted in the dismissal of other charges pending against him. The district court inquired as to the voluntariness of the plea and informed Timmreck that he could be sentenced to as much as fifteen years confinement and a $25,000 fine, which he acknowledged understanding. The record does not reflect, however, that the court informed Timmreck, or that he otherwise knew, about the three year minimum mandatory special parole term that 21 U.S.C. § 841 (b) (1) (A) requires to be added to any other sentence meted out for the offense charged.[1] The court accepted the guilty plea and, on September 19, 1974, sentenced Timmreck to ten years in prison, a $5000 fine, and an additional special parole term of five years. No appeal followed.

On August 11, 1976, Timmreck moved pursuant to 28 U.S.C. § 2255 to vacate the sentence entered upon his guilty plea. The sole ground for the motion was that his plea had been accepted in violation of Rule 11 since he was not informed of the three year minimum mandatory special parole term that had to be added to whatever sentence he otherwise received. The district court agreed that such advice had not been given. If noted, however, that Timmreck had been

[1] The three year minimum mandatory special parole term mandated by 21 U.S.C. § 841 (b) (1) (A) is unlike ordinary parole in that it must be tacked onto the end of any other sentence and does not take effect until the expiration of the primary sentence, including ordinary parole. *See Roberts* v. *United States*, 491 F.2d 1236, 1237-38 (3d Cir. 1974); *United States* v. *Richardson*, 483 F.2d 516, 518 (8th Cir. 1973).

sentenced to ten years confinement plus five years special parole, the total of which was within the fifteen years he had been told was possible, and that the $5000 fine was within the $25,000 limit explained to him. Because Timmreck's total actual sentence did not exceed the maximum outlined to him at the plea hearing, the district court found no fundamental unfairness and denied § 2255 relief on that basis. 423 F. Supp. 537 (E.D. Mich. 1976).

The holding of the district court is squarely contrary to *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975). *See also United States* v. *Cunningham*, 529 F.2d 884, 888 n.2 (6th Cir. 1976). *Wolak*, legally indistinguishable from this cause, also involved a § 2255 motion to vacate a sentence after a plea of guilty to a violation of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 21 U.S.C. § 801 *et seq.*[2] The district court in *Wolak* failed to explain to the defendant that a consequence of his guilty plea would be the imposition of at least a three

[2] *Wolak* also involved the pre-1975 amendment version of Rule 11, which required only that the defendant plead "voluntarily with understanding of the nature of the charge and the consequences of the plea." The result we reach here and that reached in *Wolak* are compelled *a fortiori* by new Rule 11, which specifically requires that the defendant understand "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law." The three year minimum mandatory special parole term would affect both the mandatory minimum and maximum possible penalties. *See United States* v. *Yazbeck*, 524 F.2d 641, 643 n. 1 (1st Cir. 1975).

year special parole term in addition to any custodial sentence.[3] We held that the district court erred both in not explaining the mandatory nature of the special parole and in misstating the required three year minimum term. 510 F.2d at 166. It was "our determination that, in order to comply with Rule 11, the district judge must inform a defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitations on parole or probation." *Id.* We reversed the denial of the § 2255 motion and instructed the district court to vacate the sentence and permit the defendant to plead anew. The same result must obtain here.

The district court was aware of our decision in *Wolak* but did not deem it controlling.[4] Instead, the court relied heavily upon several recent cases from other circuits, discussed *infra*, which have held that Rule 11 violations do not entitle one to § 2255 relief unless the error was a "fundamental defect which inherently results in a complete miscarriage of jus-

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[3] As noted by the district court here, the district court in *Wolak* did mention the special parole term to the defendant at the plea hearing but incorrectly explained it when the defendant indicated he did not understand it. There can be no reasoned distinction, however, between an affirmative misstatement of the provisions of the special parole term and failure to disclose that it exists at all.

[4] The district court apparently felt *Wolak* was distinguishable from this cause. The district court gave no explanation, however, for ignoring similar language found in *United States* v. *Cunningham*, 529 F.2d 884, 888 n. 2 (6th Cir. 1976), even while quoting the relevant language in its entirety, 423 F. Supp. at 539 n. 2.

tice."[5] We decline to follow these cases which we consider contrary both to *Wolak* and relevant Supreme Court authority.[6]

The starting point for any Rule 11 cases must be *McCarthy* v. *United States*, 394 U.S. 459 (1969). In *McCarthy*, the Supreme Court mandated strict compliance with Rule 11 before a district court can accept a guilty plea. The Court held "that prejudice inheres in a failure to comply with Rule 11, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea." *Id.* at 471-72. The remedy required for a Rule 11 violation was allowing the defendant to plead anew.

In the wake of *McCarthy's* strict language, every circuit to address the issue through 1974 held that the very factual pattern presented here (*i.e.*, failure to inform the defendant of the mandatory special parole term of § 841(b)) was a violation of Rule 11 which required vacation of the sentence entered upon the guilty plea. The cases also held this issue could be

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[5] This language, adopted by other circuits, comes from *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting in turn from *Hill* v. *United States*, 368 U.S. 424, 428 (1962), discussed *infra*.

[6] The district courts in this circuit are, of course, bound by pertinent decisions of this Court even if they find what they consider more persuasive authority in other circuits. *See Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *Union Carbide Corp.* v. *Graver Tank & Mfg. Co.*, 345 F.2d 409, 411 (7th Cir. 1965).

raised in a § 2255 proceeding. *Michel* v. *United States*, 507 F.2d 461 (2d Cir. 1974);[7] *Roberts* v. *United States*, 491 F.2d 1236 (3d Cir. 1974); *United States* v. *Richardson*, 483 F.2d 516 (8th Cir. 1973).

After 1974, however, the results began to diverge. All circuits addressing the issue presented here continued to hold that failure to inform a defendant of the special parole term constitutes a violation of Rule 11, making vacation of sentence necessary if challenged on direct appeal. But the circuits have split on whether such a Rule 11 violation can be successfully challenged in a § 2255 proceeding. Three circuits still allow § 2255 movant to vacate his sentence and plead anew. *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977);[8] *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975);[9] *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975). Five other circuits, including the second and eighth which had ruled otherwise before 1974, have opted for a different result. These courts have held that a § 2255 movant is entitled to

[7] In *Michel* the defendant could not take advantage of this holding since he had been informed of the required special parole term, but the holding in *Michel* was held to apply retroactively in *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975).

[8] *See also United States* v. *Harris*, 534 F.2d 141 (9th Cir. 1976) allowing withdrawal of a guilty plea for this Rule 11 violation pursuant to Federal Rule of Criminal Procedure 32(d).

[9] It is not clear whether *Yazbeck* was a § 2255 or Rule 32(d) case. In any event, the motion to vacate the sentence was made eight months after the guilty plea was accepted.

vacation of his sentence only if he can demonstrate prejudice from the Rule 11 violation.[10] *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977); *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), *cert. den.* 434 U.S. 834 (1977);[11] *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), *cert. den.* 429 U.S. 1045 (1977);[12] *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), *cert. den.* 424 U.S. 918 (1976); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Section 2255 relief was denied in each of these cases since no prejudice was thought to exist when, like here, the defendant's actual sentence, including the special parole term, was within the maximum possible sentence specified at his plea hearing.

The reason for this sudden shift after 1974 was the decision that year of *Davis* v. *United States*, 417 U.S. 333 (1974). *Davis* did not involve a guilty plea but rather dealt with § 2255 relief after a jury conviction. The Supreme Court held that a change in the law after conviction, and not just constitutional er-

[10] The position of the District of Columbia circuit is ambiguous. When presented with the issue, it remanded the cause to the district court with directions to treat the § 2255 motion to vacate as a Rule 32(d) motion. *United States* v. *Watson*, 548 F.2d 1058 (D.C. Cir. 1977).

[11] See also *United States* v. *Eaton*, 579 F.2d 1181 (10th Cir. 1978), 23 Crim. L. Rptr. 2092, following *Hamilton*, and noting that the special parole term could be for life.

[12] *See also, United States* v. *Kattou*, 548 F.2d 760 (8th Cir. 1977), *United States* v. *Rodrique*, 545 F.2d 75 (8th Cir. 1976), *and United States* v. *Ortiz*, 545 F.2d 1122 (8th Cir. 1976), following *McRae*.

rors at trial, could serve as the basis for a § 2255 proceeding. The Court added a paragraph of dicta, however, which we reproduce here in full:

> This not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.*, at 428 (internal quotation marks omitted). The Court did not suggest that any line could be drawn on the basis of whether the claim had its source in the Constitution or in the "laws of the United States." 417 U.S. at 346

This paragraph has been seized upon by four of the five circuits requiring a § 2255 movant to show prejudice in order to vacate a sentence entered upon a plea of guilty taken in violation of Rule 11.[13] *Del*

[13] *Bell*, 521 F.2d at 715, reached this result without citation of *Davis*.

The Fourth Circuit did, however, rely upon *Davis* (and, *inter alia*, *Del Vecchio*, *Hamilton* and *McRae*) in reaching the

Vecchio, 556 F.2d at 110; *Hamilton*, 553 F.2d at 65; *McRae*, 540 F.2d at 945; *Bachner*, 517 F.2d at 591. It was also relied upon by the district court here. 423 F.Supp. at 539. These courts have held that the conceded Rule 11 error is not cognizable in a § 2255 proceeding when the defendant's total actual sentence is within that specified at the plea hearing. This is justified by reference to *Davis*, concluding that "the claimed error of law was [not] 'a fundamental defect which inherently results in a complete miscarriage of justice.'" *See Del Vecchio*, 556 F.2d at 110-11; *Hamilton*, 553 F.2d at 66; *McRae*, 540 F.2d at 945; *Bachner*, 517 F.2d at 592-93. *See also Bell*, 521 F.2d at 714-15 (harmless error analysis).

We are thus faced with the difficult task of reconciling the somewhat contradictory language of the Supreme Court in *McCarthy* and *Davis*. On the one hand, the Court said in its unanimous[14] decision in *McCarthy* that "prejudice inheres in a failure to comply with Rule 11." 394 U.S. at 471. On the other hand, at first blush the Rule 11 violation at issue here does not seem to rise to the level of a "fundamental defect which inherently results in a complete miscarriage of justice." 417 U.S. at 346.

same result in a case involving a different Rule 11 violation. *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978), 23 Crim. L. Rptr. 2137. The court in *White* did not even cite *Bell* for support.

[14] Justice Black filed a separate concurring opinion.

Our decision is controlled, however, by our prior post-*Davis* decision in *Wolak*.[15] Moreover, between *McCarthy* and *Davis* we consider *McCarthy* more apposite to this cause. *McCarthy* was, as this, a Rule 11 case and the Supreme Court hinted at no exceptions to its policy of strict enforcement of Rule 11. The relevant paragraph in *Davis* was dicta which relied on *Hill* v. *United States*, 368 U.S. 424 (1962), which involved a violation of Federal Rule of Criminal Procedure 32(a) allowing a defendant to speak on his behalf before imposition of sentence. Admittedly *McCarthy* involved a direct appeal but if "prejudice inheres in a failure to comply with Rule 11," then it must be cognizable in a § 2255 proceeding. We reconcile *McCarthy* and *Davis* by holding that a Rule 11 violation is per se prejudicial and thus must be a

[15] One panel of this Court cannot overrule the decision of another panel; only the Court sitting *en banc* can overrule a prior decision. *See Doraiswamy* v. *Secretary of Labor*, 555 F.2d 832, 847-48 n. 119 (D.C. Cir. 1976), and cases cited therein; *Doe* v. *Charleston Area Medical Center, Inc.*, 529 F.2d 638, 642 (4th Cir. 1975); *McClure* v. *First Nat'l Bank*, 497 F.2d 490, 492 (5th Cir. 1974), *cert. den.* 420 U.S. 930 (1975).

We recognize that neither *Wolak* nor any of the other cases reaching the same result after *Davis* mention *Davis*. This is probably because the holding of *Davis* is irrelevant to the issue presented; only the paragraph of dicta quoted earlier is relevant. Nevertheless, we do not believe that *Wolak's* failure to cite *Davis* serves as a basis for distinguishing it. We believe the courts which contend that the quoted paragraph of *Davis* represented a new development in the law are incorrect since the paragraph at issue consists almost entirely of a quotation and paraphrase of a case decided in 1962. *See, Del Vecchio and McRae, supra*, modifying *Michel* (and *Ferguson*) *and Richardson, supra*, respectively.

"fundamental defect which inherently results in a complete miscarriage of justice." We feel that any other reconciling of the two cases which emphasizes *Davis* over *McCarthy* should come only from the Supreme Court.[16]

We recognize that our decision "erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free because it is impossible, as a practical matter, to retry him," *Del Vecchio*, 556 F.2d at 109 (footnote omitted), since memories fade and witnesses become unavailable over time. Finality is a salutary principle which should be furthered by the courts. *Blackledge* v. *Allison*, 431 U.S. 63, 71-72 & 83-84 (Powell, J. concurring) (1977); *Henderson* v. *Kibbe*, 431 U.S. 145, 154 n. 13 (1977). Finality is best served, however, by insisting that guilty pleas be accepted properly initially rather than by narrowing the scope of collateral relief. The failure to preserve finality in this and similar cases must be laid squarely at the feet of the United States Attorneys and their assistants who fail to exercise the rather small degree of care necessary to comply with

[16] Given the frequency with which this issue arises and the severe split among the circuits, hopefully the Supreme Court will resolve this issue in the near future. Every circuit except the fifth, *cf. Johnson* v. *United States*, 542 F.2d 941 (5th Cir. 1976), *cert. den.* 430 U.S. 934 (1977) (§ 2255 relief denied for other Rule 11 violation), has expressed its position on this issue which is at the heart of the administration of the federal drug laws in particular (the effect of 21 U.S.C. § 841(b)) and all federal criminal laws in general (the scope of § 2255 relief after *Davis*.)

Rule 11.[17] The Supreme Court said in *McCarthy* that one purpose of requiring strict adherence to Rule 11 was to "reduce the great waste of judicial resources required to process the frivolous attacks on guilty plea convictions that are encouraged, and are more difficult to dispose of, when the record is inadequate." 394 U.S. at 472. The large number of Rule 11 errors in the reported cases suggests that this admonition is not being heeded.[18] We hope that our ruling herein will motivate strict compliance with Rule 11 in the future.

The judgment of the district court is reversed and the cause is remanded with instructions to vacate the sentence entered upon the guilty plea and to allow Timmreck to plead anew.

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[17] The district courts, of course, are also responsible for Rule 11 errors since Rule 11 is directly addressed to the court accepting the guilty plea. If the district court does not fully comply with Rule 11, the government attorney should realize this and take steps to insure the necessary colloquy is placed in the record.

[18] "The case is another of the many we have had that attack a conviction on a guilty plea because the district judge allegedly failed to follow the directions of Fed. R. Crim. P. 11." *Del Vecchio*, 556 F.2d at 107.

"These appeals challenging two guilty pleas and sentences thereon arise, like many others, from omissions by trial judges to advise a defendant at a hearing on a plea of guilty of special provisions of the federal narcotics laws relating to sentencing. . . ." *Bachner*, 517 F.2d at 590-91 (footnote omitted).

The above quoted sentences are the very first sentences in each of the above cases, suggesting the courts' frustration with this problem.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1572

[Filed June 12, 1978]

CHARLES TIMMRECK, PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

Before CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

JUDGMENT

APPEAL from the United States District Court for the Eastern District of Michigan.

THIS CAUSE came on to be heard on the record from the United United States District Court for the Eastern District of Michigan and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be and the same is hereby reversed and the cause remanded with instructions to vacate the sentence entered upon the guilty plea and to allow Timmreck to plead anew.

It is further ordered that Petitioner-Appellant recover from Respondent-Appellee the costs on appeal, as itemized below, and that execution therefor issue out of said District Court if necessary.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 77-1572

[Filed August 7, 1978]

CHARLES TIMMRECK, PETITIONER-APPELLANT,

v.

UNITED STATES OF AMERICA,
RESPONDENT-APPELLEE.

ORDER

Before: CELEBREZZE, LIVELY and ENGEL, Circuit Judges.

Appellee filed a petition for rehearing with a request for rehearing en banc. No judge of this court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT
JOHN P. HEHMAN, Clerk

By /s/ Grace Keller
GRACE KELLER, Chief
Deputy

APPENDIX D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil Action No: 6-71867

CHARLES TIMMRECK, PLAINTIFF,

v.

UNITED STATES OF AMERICA, DEFENDANT.

MEMORANDUM OPINION

Petitioner, Charles Timmreck, pleaded guilty to a violation of 21 U.S.C. § 846 (conspiracy to distribute a controlled substance) on May 24, 1974. On September 19, 1974, he was sentenced to a prison term of ten years, a five thousand dollar committed fine, and a special parole term of five years. Timmreck now brings a motion to vacate this sentence (28 U.S.C. § 2255) claiming that the trial court failed to inform him of the mandatory special parole term prescribed by 21 U.S.C. § 841(b). Timmreck claims that he was not made fully aware of the possible consequences of his plea and asks that the plea and sentence be vacated.

Upon careful review of the transcript of the plea proceedings, it appears that the court informed Timmreck that he could serve as long as fifteen years in jail and be subjected to a fine of $25,000. (Tran-

script at 7, 8). No mention was made of the mandatory special parole term.

When a guilty plea is taken the court must address the defendant personally in open court in order to determine "that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." Rule 11, Federal Rules of Criminal Procedure (1966 version).[1]

The United States Supreme Court has construed Rule 11 to "hold that a defendant is entitled to plea anew if a United States District Court accepts his guilty plea without fully adhering to the procedure provided for in Rule 11." *McCarthy* v. *United States*, 394 U.S. 459, 463 (1969). The Court in *McCarthy* held that the defendant should have been permitted to withdraw his plea when the district judge had neither examined the defendant personally to determine the voluntariness of his plea and his awareness of the nature of the charge nor made a record of the factual basis for the plea.

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[1] The Rule 11 referred to in this opinion is the rule in effect when Timmreck made his plea. The rule now in effect requires the court to address the defendant personally to inform him of and to determine that he understands

> "the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law."

Rule 11(c)(1), Federal Rules of Criminal Procedure (1975 version).

The court would reach the same decision in this case if the 1975 version had been in effect when Timmreck's plea was taken.

Although *McCarthy* was not a § 2255 case, the United States Court of Appeals for the Sixth Circuit has made reference to its holding in reviewing motions made pursuant to 28 U.S.C. § 2255. In *Harris* v. *United States*, 426 F.2d 99 (6th Cir. 1970), for example, the defendant had not been informed that he was ineligible for parole. The court remanded for a hearing to determine whether the defendant had known of his parole ineligibility, but had the plea been made after the effective date of *McCarthy*, the court would have vacated the sentence. *Harris*, at 101. In *Harris*, the United States Court of Appeals approved ". . . [A]n interpretation of Rule 11 which requires a personal explanation of *anything which affects the length of detention*. . . ." [original emphasis]. *Spradley* v. *United States*, 421 F.2d 1045, 1046 (5th Cir. 1970), quoted in *Harris* at 101. *See also United States* v. *Wolak*, 510 F.2d 164, 166 (6th Cir. 1975) (The trial judge must personally "inform a defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitation on parole or probation."); *Phillips* v. *United States*, 519 F.2d 483, 485 (6th Cir. 1975) ("The requirement [is] that the judge personally discuss the consequences of the plea with a defendant at the time the plea is offered.").

The United States Court of Appeals for the Sixth Circuit has never directly addressed the situation presented in this case.[2] *Wolak* dealt with a situation

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[2] In *United States* v. *Cunningham*, 529 F.2d 884 (6th Cir. 1976), the court did address a similar situation indirectly. In that case the trial judge permitted defendants to withdraw

in which the trial judge had informed the defendant of the existence of a special parole term but had neglected to explain its meaning when the defendant indicated his lack of understanding. In *Phillips*, the trial judge had not addressed the defendant about any of the consequences of his plea but had relied on assurances of defense counsel that defendant had been fully advised by him.

Here the court told Timmreck that he could be imprisoned for fifteen years; Timmreck was then sentenced to ten years in jail plus a five-year special parole term. Since the jail sentence and the parole term together equal the term of imprisonment which Timmreck was informed he could receive, he was not prejudiced by the court's failure to inform him of the mandatory special parole term. Absent some indication of prejudice to the defendant or a complete miscarriage of justice, Section 2255 is unavailable to correct mere technical errors.

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their pleas after imposition of sentence solely because he had failed to inform them of the special parole term. Defendants were tried and convicted. On appeal, the Sixth Circuit found occasion to remark:

> ". . . [D]efendants were entitled to withdraw their pleas in this case because the district court did not comply with Rule 11, Federal Rules of Criminal Procedure, in failing to inform defendants of the possibility of special parole terms as provided by Sec. 841(b) . . . [citations omitted]. If the error had not been corrected at this point in the proceedings, it could have been raised through motion under 28 U.S.C. Sec. 2255."

Cunningham at n. 2.

> This is not to say, however, that every asserted error of law can be raised on a § 2255 motion. In *Hill* v. *United States*, 368 U.S. 424, 429 (1962), for example, we held that "collateral relief is not available to comply with the formal requirements" of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error. We suggested that the appropriate inquiry was whether the claimed error of law was "a fundamental defect which inherently results in a complete miscarriage of justice," and whether "[i]t . . . present[s] exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Id.* at 428. [internal quotation marks omitted].

Davis v. *United States*, 417 U.S. 333, 346 (1974).

The United States Courts of Appeals for the Fourth, Seventh and Eighth Circuits have applied the *Davis* reasoning in cases similar to this one. In *Bell* v. *United States*, 521 F.2d 713 (4th Cir. 1975), *cert. denied*, 96 S.Ct. 1121 (1976), the trial judge had informed the defendant that he could receive a prison sentence of fifteen years if he pleaded guilty. The defendant was later sentenced to six years' imprisonment and a three-year special parole term. The court held that where the prison sentence together with the special parole term were no more than the maximum prison term of which the defendant had been advised, vacation of the plea was not required either to insure its voluntariness or to create an adequate record under Rule 11. In *Bell*, the court decided that the

requirements of *McCarthy* were satisfied since the defendant had been informed of those consequences of his plea which would have an effect on the range of his punishment. *Bell* at 715.

Similarly, in *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), the United States Court of Appeals for the Eighth Circuit stated:

> [U]nder *Davis* the ultimate question to be determined is this: was there a fundamental defect in the proceedings which inherently resulted in a complete miscarriage of justice and presented exceptional circumstances that justify collateral relief?

McRae at 947.

In *McRae*, the court answered in the negative where the defendant had made a Rule 11 bargain for a seven year maximum prison term and his prison sentence and special parole term together equaled six years. *See also Sappington* v. *United States*, 523 F.2d 858 (8th Cir. 1975) (Webster, J., concurring).

The United States Court of Appeals for the Seventh Circuit upheld a ten year sentence and a three-year special parole term where the defendant had been advised that he could receive a sentence of fifteen years. *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Particularly instructive is the analysis of Judge Stevens:

> In this case I am satisfied that the trial judge's failure to advise the petitioner that he would have to serve a special parole term of at least three years after his release from prison did not make his plea involuntary. If there had been a material difference between the punishment which the judge had the power to impose and the punishment which the judge advised the defendant he could receive, the advice might be sufficiently deceptive to make the plea involuntary. That conclusion would follow regardless of what sentence the judge might impose; for, as I previously suggested the voluntariness of the defendant's choice is unaffected by an event occurring after his choice is made. In this case, I agree that the mandatory parole term, though a matter of importance, is a comparatively minor factor when considered in connection with the judge's advice to the defendant that he might be imprisoned for as long as 15 years. The omission, in my judgment, did not make the advice which was actually given materially misleading; accordingly, the plea was voluntary.
>
> On the fairness issue, I think the advice should be compared with the actual sentence rather than with a correct statement of the sentence that might properly have been imposed. As long as the actual sentence was less than the maximum as described in the judge's advice, I would find no unfairness—and certainly not any unfairness sufficiently grave to qualify as constitutional error.

Bachner at 599 (Stevens, J., concurring). *See also United States* v. *Dorszynski*, 524 F.2d 190 (7th Cir. 1975), *cert. denied*, 96 S.Ct. 1483 (1976); *Gates* v. *United States*, 515 F.2d 73 (7th Cir. 1975).

In none of the recent decisions which do indicate that a sentence should be vacated simply because the

trial judge neglected to inform the defendant of a special parole term does it appear whether the prison sentence together with the special parole term exceeded the maximum prison term of which the defendant had been advised. *See Roberts* v. *United States*, 491 F.2d 1236 (3rd Cir. 1974); *Ferguson* v. *United States*, 513 F.2d 1011 (2d Cir. 1975); *United States* v. *Harris*, 534 F.2d 141 (9th Cir. 1976); *United States* v. *Jones*, 540 F.2d 465 (10th Cir. 1976).

This is crucial. If the prison sentence together with the special parole term did exceed the maximum which the court had advised the defendant he could receive, that would amount to fundamental unfairness and would be reason to vacate or modify the sentence. However, that is not the situation in Timmreck's case. Timmreck's plea was voluntary; there was no fundamental unfairness in the proceeding.[a]

[a] In Timmreck's case the court notes also two additional factors: (1) defense counsel's assurance that he had told Timmreck about the possible consequences of his plea (Transcript at 16) and (2) the two years between sentence and motion to vacate. Both factors were viewed by the court in *McRae* as further indications of the voluntariness of the plea and the essential fairness of the proceeding. *McRae* at 947.

Accordingly, Timmreck's motion to vacate sentence is denied. An order is entered herewith.

/s/ John Feikens
JOHN FEIKENS
United States District Judge

DATE: December 3, 1976,
Detroit, Michigan.

A TRUE COPY
HENRY R. HANSSEN
Clerk

By /s/ Bonnie Humm
Deputy Clerk

☆ U. S. GOVERNMENT PRINTING OFFICE: 1978 276531 172

APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA,

Petitioner

—*v.*—

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 3, 1978
CERTIORARI GRANTED JANUARY 8, 1979

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RELEVANT DOCKET ENTRIES

1976

September 9 Motion to Vacate Sentence, filed.

September 7 Govt's supplemental answer & brief in response to motion to vacate

September 13 Pltf's amended motion to vacate guilty plea with affidavit.

September 13 Proof of service re pltf.'s supplemental memorandum of law in support of motion to vacate. BA

(out of order)

September 8 Motion to vacate sentence (plea) taken under advisement. DD 9/15/76 Feikens, J.

Sept. 15 Government's Second Supplemental Answer in Opposition to Deft's motion to vacate guilty plea with BA & proof of service.

Dec. 6 Memorandum opinion denying pltf.'s motion to vacate sentence, filed and entered. (judge signed 12/3/76) DD 12/7/76 Feikens, J.

Dec. 6 Order denying pltf.'s motion to vacate sentence, filed and entered (judge signed 12/3/76) DD 12/7/76 (cards sent) Feikens, J.

Dec. 28 Notice of appeal by pltf. with proof of service. DD 1/5/77

1977

Jan. 4 Copy of letter to atty. for pltf. re appeal with attachment. DD

Jan. 4 Proof of mailing re notice of appeal by pltf. DD 1/5/77

Feb. 22 Stip. for designation of record on appeal and for joint appendix. DD 2/23/77

June 2 Order from C.C.A. extending time to docker record on appeal until June 24/77. DD 6/3/77.

Sept. 7 Record on Appeal. DD 9/12/77

Sept. 21 True copy of motion from CCA granting extension of time for transmission of record on appeal. DD 9/23/77.

GUILTY PLEA PROCEEDINGS

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

[2]

Detroit, Michigan
Friday, May 24, 1974
About 9:30 a.m.

THE CLERK OF THE COURT: Criminal Action No. 47253, The United States of America versus "Hyland" Charles Fye.

THE COURT: Mr. Mogill.

MR. MOGILL: If it please the Court, I have had an opportunity to consult with my client and also I have had an opportunity to discuss this matter with him, and also discussed it with Mr. Kaufman.

At this time he will withdraw the previously entered plea of not guilty and enter a plea of guilty to Count I of the Indictment.

MR. KAUFMAN: Your Honor, may I say something?

THE COURT: Yes.

MR. KAUFMAN: This is a part of a plea bargain arrangement which we have done with other defendants in this case, your Honor, and I have agreed with Mr. Mogill and his client that after sentencing I will dismiss, or the Government will dismiss the remaining [3] Counts of the Indictment.

Further, we agree that we will not pursue an Indictment or charge under 3150, that is the bond jumping charge. Other than that, we have made no other agreements with counsel or with the Defendant.

Is that correct?

MR. MOGILL: That is correct.

THE COURT: You understand that, Mr. Fye?

THE DEFENDANT: Yes, sir, I do.

THE COURT: Let the record show that your full name is Hyland C. Fye; is that correct?

THE DEFENDANT: My name is Charles Timmreck.

THE COURT: Well, it's known here as Hyland C. Fye, and how are you really known, by Charles Timmreck?

THE DEFENDANT: Charles Timmreck.

THE COURT: And what is the Hyland C. Fye, an alias?

THE DEFENDANT: Yes, your Honor.

THE COURT: So the record will note, then, that you appear here as Charles Timmreck, also known [4] as Hyland C. Fye, or Hyland C. Fye whose real name is Charles Timmreck.

THE DEFENDANT: That's correct.

THE COURT: Now, you prefer, then, that I address you as Mr. Timmreck?

THE DEFENDANT: Yes, your Honor.

THE COURT: Any objection to that?

MR. KAUFMAN: No, sir, your Honor.

THE COURT: Can it be understood that the Indictment to which the plea is being made as to Count I is amended in form so as to carry that out?

MR. KAUFMAN: I will so move.

THE COURT: Mr. Timmreck, how old are you?

THE DEFENDANT: 38.

THE COURT: Do you know of any difficulty that you have, either medical or in any psychiatric sense that prevents you from understanding the nature of what goes on here today?

THE DEFENDANT: No, your Honor.

THE COURT: You see, what I want to get at and be sure of is that you fully understand what you are doing.

[5] THE DEFENDANT: Yes, sir.

THE COURT: Are you of the opinion that you do?

THE DEFENDANT: Yes, sir.

THE COURT: I take it that you have no trouble with drug addiction, do you?

THE DEFENDANT: No, your Honor.

THE COURT: Now, in this case, as you know, there is a trial going on as to at least some of the Defendants who were indicted in this case along with you. You know that now?

THE DEFENDANT: Yes.

THE COURT: And I only bring that up to say that you do have a right, if you elect so to do, to stand trial in this case. Do you understand that?

THE DEFENDANT: Yes.

THE COURT: And if you so elect, you could do that. The Government would have to prove your guilt beyond a reasonable doubt. You would not have to prove your innocence on your behalf.

Mr. Mogill could cross-examine witnesses who appeared against you, and you would have the right to remain silent; you would not have to take [6] the witness stand if you chose not so to do, and if you didn't, I would instruct the jury that they could draw no adverse inference against you.

These are the rights that you have. Now, do you understand those rights?

THE DEFENDANT: Yes, sir.

THE COURT: Now, do you waive those rights?

THE DEFENDANT: Yes, sir.

THE COURT: In this document that was handed to me, your signature appears as Hyland C. Fye, appears as Charles Timmreck?

THE DEFENDANT: Yes, sir.

THE COURT: Did you sign that?

THE DEFENDANT: Yes, sir.

THE COURT: Did you read it before you signed it?

THE DEFENDANT: Yes, your Honor.

THE COURT: Do you have any questions that you want to put to Mr. Mogill or me with regard to the waiver of your Constitutional rights?

THE DEFENDANT: No, sir.

THE COURT: I take it, then, that you [7] know what those rights are, and you consciously waive those rights?

THE DEFENDANT: Yes, your Honor.

THE COURT: Are you of the opinion that Mr. Timmreck has done that, Mr. Mogill?

MR. MOGILL: Yes, I am, Judge.

THE COURT: Now, if I accept your plea of guilty,

Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

THE DEFENDANT: No, sir.

THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?

THE DEFENDANT: I have now, yes.

THE COURT: Now you know?

THE DEFENDANT: Yes, sir.

THE COURT: I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case. You would have a right, if you wish at this stage to withdraw [8] your plea.

THE DEFENDANT: Yes, sir.

THE COURT: Do you wish to change your mind and not plead?

THE DEFENDANT: No. I was in the thing, and as far as marijuana was concerned. I was involved in that, but nothing else.

THE COURT: I wasn't asking you whether or not you plead guilty, and I thank you for telling me what you have, but I want to be sure before I take your plea that you know what the consequences could be.

THE DEFENDANT: Yes.

THE COURT: I have sentenced men to jail in this case before.

THE DEFENDANT: Yes, sir.

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.

THE DEFENDANT: Yes, sir.

THE COURT: You understand that?

THE DEFENDANT: Yes, sir.

THE COURT: In view of that, how do [9] you plead?

THE DEFENDANT: I plead guilty.

THE COURT: To Count I of this Indictment?

THE DEFENDANT: Yes, sir.
THE COURT: Now, Mr. Timmreck, tell me what your involvement was? What did you do that brings you to the point that you say you are guilty of the charges contained in Count I of this Indictment?
THE DEFENDANT: Well, I did receive some marijuana through these people, and—
THE COURT: By "these people," you mean some of the—
THE DEFENDANT: Some of the Defendants who were indicted, were involved in the trial right now.
THE COURT: Who did you—
MR. MOGILL: If it please the Court—
THE COURT: Mr. Mogill, I have been listening to cases and testimony—
MR. MOGILL: I understand that.
THE COURT: And I am sure that this is not going to in any way affect anybody's rights because I am not the trier of the facts.
[10] MR. MOGILL: I understand that. I would just urge the Court, I believe the substantive facts are made out without specification of names.
THE COURT: I think maybe you are right, particularly when I have had the opportunity of securing possible corroborations, what I have been told through the facts that have been testified to in this court.
MR. MOGILL: Thank you, Judge.
THE COURT: Let's leave it at that.
Some of these co-defendants of yours from whom you got marijuana; is that correct?
THE DEFENDANT: Yes, your Honor.
THE COURT: Now, what you are charged here with is a conspiracy. Do you know what a conspiracy is? It's an agreement. Did you enter into an agreement of some kind? I don't mean in written form, but did you and these others act together, in concert together? Did you undertake to do some certain things with regard to marijuana?
THE DEFENDANT: Well, I did receive the marijuana, yes.

THE COURT: Yes?
THE DEFENDANT: But I did not, you [11] know, know exactly how it got to Detroit.
THE COURT: And what was your part in the arrangement or agreement? What did you have to do?
THE DEFENDANT: Well, I just receive some of it and sold it for them.
THE COURT: For the group?
THE DEFENDANT: Yes.
THE COURT: Is that right?
THE DEFENDANT: Yes.
THE COURT: You know that there were a number of persons that were involved?
THE DEFENLANT: Actually, the involvement of mine was with just a couple.
THE COURT: It doesn't matter how many.
THE DEFENDANT: —because I was in California most of the time.
THE COURT: It doesn't matter how many, Mr. Timmreck. The question I'm getting at is that you knew there was an arrangement of some kind in which you participated; is that correct?
THE DEFENDANT: Well, I realized they did bring it here from Mexico, I suppose, and I took [12] a portion of what they had and sold it.
THE COURT: Now, the Indictment in Count I says this took place sometime between April of 1970 up to and including the 10th of May 1972.
Did the activity to which you make reference occur within that period?
THE DEFENDANT: Yes, sir.
THE COURT: Between April of '70 and May 10th of '72?
THE DEFENDANT: Yes, sir.
THE COURT: And in your activities, you say that much of it occurred in California?
THE DEFENDANT: Well, not really. I mean, with those people, I was in California most of the time.
THE COURT: I see.
THE DEFENDANT: But I came back here for Christmas and then I met the people.

THE COURT: Did some of your activities occur in this area?

THE DEFENDANT: This area, yes, your Honor.

THE COURT: Can you give me some idea [13] of what you did in the Detroit area?

THE DEFENDANT: Well, I probably all told, at the very most, sold two hundred pounds of marijuana.

THE COURT: In this area?

THE DEFENDANT: Yes, sir.

THE COURT: As a result of this arrangement that you had with the people?

THE DEFENDANT: Yes, sir.

THE COURT: It that correct?

THE DEFENDANT: Yes, sir.

THE COURT: Now, at the time that you did this, you knew that this was wrong, an offense against the law?

THE DEFENDANT: Well, at the time, your Honor, I think they had just ruled that the Michigan law was thrown out for a while.

THE COURT: I am talking about the Federal law. Since this is a United States Court, I can't really be concerned directly with Michigan law.

THE DEFENDANT: Yes, sir.

THE COURT: Did you have knowledge, Mr. Timmereck, that what you were doing was wrong and [14] contrary to our law?

THE DEFENDANT: Well, yes. I knew.

THE COURT: There is no question about that, is there?

THE DEFENDANT: No, sir.

THE COURT: That's why you you say you are guilty?

THE DEFENDANT: Yes, sir.

THE COURT: Are there any other questions with regard to a factual basis for a plea of guilty to Count I to this Indictment, Mr. Kaufman?

MR. KAUFMAN: I have no further questions. The evidence does show that he was involved in other drugs, however, your Honor.

THE COURT: I think, Mr. Mogill, in view of the fact that I am in the unusual circumstances of listening to testimony, even though I am not the trier of the facts, I can't accept that as corroborative of a plea of guilty in this case.

Do you understand?

THE DEFENDANT: Yes.

THE COURT: I'm sure you do.

Now, has anyone forced you to make [15] this plea of guilty?

THE DEFENDANT: No, your Honor.

THE COURT: You are doing this, then, as I understand, because you want to do it, voluntarily.

THE DEFENDANT: Yes, sir.

THE COURT: Outside of the understanding that Mr. Kaufman stated a moment ago, that is that all of the remaining Counts in this Indictment be dismissed against you and that there would be no prosecution against you for having jumped bail, so to speak—

THE DEFENDANT: Yes.

THE COURT: You understand what I mean by that?

THE DEFENDANT: Yes.

THE COURT: Outside of those promises, have there been any other promises of any kind made to you in order to get you to plead guilty?

THE DEFENDANT: No, sir.

THE COURT: You have not been threatened in any way?

THE DEFENDANT: No, sir.

THE COURT: Mr. Mogill, are you of the opinion that there is a factual basis for this plea?

[16] MR. MOGILL: Yes, I am.

THE COURT: And that your client knows full well the consequences of a guilty plea might be?

MR. MOGILL: That's correct.

THE COURT: Very well, Mr. Timmreck, I will accept your plea of guilty to Count I of this Indictment.

I find on this record that you have voluntarily made this plea of guilty; that you have knowingly and consciously waived your Constitutional right in order to

make this plea; that you make the plea knowing full well what the possible consequences of your plea; and finally, that there is a factual basis for the plea of guilty to Count I.

So, I will accept it and I will refer your case to the Probation Department of this Court for a presentence report, and I will remand you to the custody of the Marshals to await sentencing.

THE DEFENDANT: Yes, sir.

THE COURT: Anything further?

MR. KAUFMAN: Nothing further, your Honor. Thank you.

THE COURT: We will be in recess.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 76-71867

[Filed September 13, 1976]

CHARLES TIMMRECK, PLAINTIFF

—*vs.*—

UNITED STATES OF AMERICA, DEFENDANT

AMENDED MOTION TO VACATE GUILTY PLEA

NOW COMES CHARLES TIMMRECK, Plaintiff herein, by and through his attorney KENNETH M. MOGILL, and moves this Honorable Court for an Order vacating his guilty plea in this cause for the following reasons:

1. On May 24, 1974, Plaintiff pled guilty in this Court to distribution of a controlled substance in violation of 21 USC § 841(a)(1).
2. On September 19, 1974, Plaintiff was sentenced to a prison term of ten (10) years, plus a five thousand ($5,000.00) dollar fine and special parole term of five (5) years.
3. When questioned by the court at the time of his plea, Plaintiff indicated that he did not understand the consequences of his plea of guilty.
4. F R Crim P 11 requires that before a judge may accept a plea of guilty he or she must determine that the plea is made voluntarily, with an understanding of the nature of the charge and the consequences of the plea.
5. In advising Plaintiff of the consequences of his guilty plea in this case, the court failed to inform Plaintiff of the mandatory special parole term required by 21 USC § 841(a)(1).
6. This motion is brought pursuant to 28 USC § 2255.

WHEREFORE, Plaintiff prays this Court for an Order vacating his guilty plea herein.

Respectfully submitted,

/s/ Kenneth M. Mogill
KENNETH M. MOGILL P17865
Attorney for Plaintiff
1455 Centre Street
Detroit, Michigan 48226
962-7210

Dated: September 10, 1976

AFFIDAVIT

STATE OF MICHIGAN)
) ss.
COUNTY OF WAYNE)

Kenneth M. Mogill being first duly sworn, deposes and says that he has read the foregoing Motion by him subscribed and knows the contents contained therein to be true, except those matters stated to be upon information and belief, and as to those matters he believes them to be true.

/s/ Kenneth M. Mogill
KENNETH M. MOGILL

Subscribed and sworn to before me this 10th day of September, 1976

/s/ Karen E. Cairns
KAREN E. CAIRNS
Notary Public, Wayne County, Michigan

My Commission Expires: 2/20/80

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

No. 47253

UNITED STATES OF AMERICA, PLAINTIFF

—*vs.*—

CHARLES TIMMRECK, a/k/a HYLAND C. FYE, DEFENDANT

BRIEF IN SUPPORT OF MOTION TO VACATE GUILTY PLEA

STATEMENT OF FACTS

On May 24, 1974, Defendant pled guilty before this Court of distribution of a controlled substance, in violation of 21 USC § 841(a)(1). At the time of the taking of the plea, the Court advised Defendant of the maximum time to which he could be sentenced and the maximum fine which could be imposed. The Court failed, however, to inform Defendant of the mandatory special parole term to which he would be subject if he were sentenced to a prison term of any length.

The relevant colloquy was as follows:

> Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?

Defendant replied that he did not know, and the Court continued:

> Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. . . . I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case (p 7).

At the conclusion of the hearing, without further mention of any additional consequences, the Court accepted Defendant's plea of guilty.

Defendant was subsequently sentenced on September 19, 1974, to a prison term of ten (10) years plus a five thousand ($5,000.00) dollar fine and a special parole term of five (5) years.

This is Defendant's Brief in Support of Motion to Vacate Guilty Plea.

ARGUMENT

> WHERE A DEFENDANT WHO DOES NOT KNOW THE CONSEQUENCES OF HIS GUILTY PLEA IS NOT ADVISED AT THE TIME OF HIS PLEA THAT A SPECIAL PAROLE TERM IS MANDATORY IF A PRISON SENTENCE SHOULD BE IMPOSED IN HIS CASE, DEFENDANT HAS NOT BEEN ADVISED OF THE CONSEQUENCES OF HIS PLEA WITHIN THE MEANING OF F R CRIM P 11, AND A PLEA SO MADE MUST BE SET ASIDE.

This motion is brought pursuant to the provisions of 28 USC § 2255, which provides in pertinent part that a person in the custody of the United States challenging the lawfulness of that custody may move in the Court which imposed his or her sentence to vacate that sentence and plea.

F R Crim P 11 requires that a district court may not accept a plea of guilty "without first addressing the Defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequences of the plea." In order for the plea to be voluntarily made, it must be made by " 'one fully aware of the direct consequences' " *Brady* v. *United States*, 397 US 742, 755, 90 SCt 1463, 25 LEd2d 747, 760 (1969), of the plea.

This requirement grows out of a concern that guilty pleas be truly voluntary.

Numerous courts, including this Sixth Circuit, have considered whether a mandatory special parole term is a "direct consequence" within the meaning of Rule 11 and *Brady, supra.* Their answers have been affirmative.

In *United States* v. *Wolak*, 510 F2d 164, 166 (6th Cir, 1975), a case arising out of this district, the district judge had failed to inform the Defendant of the special parole provision mandated by the same statute involved here, and for that reason the Court of Appeals vacated the Defendant's plea. The Court noted that:

> Although the emphasis in the case law has been upon the requirement that the judge inform the Defendant of the maximum possible period of incarceration, this circuit and others have indicated that a Defendant must be aware of other direct consequences of his plea. . . It is our determination that, in order to comply with Rule 11, the district judge must inform a Defendant of the minimum sentence, either custodial or parole where there is a mandatory minimum, and of any special limitations on parole or probation.

See also *United States* v. *Yazbeck*, 524 F2d 641 (1st Cir, 1975); *Ferguson* v. *United States*, 513 F2d 1011 (2nd Cir, 1975); *United States* v. *Valenciano*, 495 F2d 1236 (3d Cir, 1974); *United States* v. *Richardson*, 482 F2d 516 (8th Cir, 1974).

Defendant here was charged under and pled guilty to violation of 21 USC § 841(a)(1) which requires that "any sentence imposing a term of imprisonment under this paragraph shall . . . impose a special parole term of at least three years, in addition to such term of imprisonment". This special parole term has unique terms in that it is mandatory for Defendants who are sentenced to imprisonment and it is given in addition to rather than in substitution for regular parole, provisions making it all the more important that the plea taking judge carefully explain its provisions to a Defendant in order for him or her fully to comprehend the consequences of a guilty plea. Defendant did not know of the mandatory special parole term, and he was

not advised of it at the time of his plea. F R Crim P 11 was therefore not complied with, and his plea must be set aside.

CONCLUSION

For all the reasons stated above, Defendant's guilty plea should be vacated.

Respectfully submitted,
/s/ Kenneth M. Mogill
KENNETH M. MOGILL P17865
Attorney for Defendant
1455 Centre Street
Detroit, Michigan 48226
962-7210
Molly Reno
(Legal Assistant)

Dated: August 10, 1976

HEARING ON MOTION TO VACATE GUILTY PLEA

[2]

Detroit, Michigan
Wednesday, September 8, 1976
About 3:00 P.M.

THE CLERK: Call the case of Charles Timmreck versus the United States—this is Criminal Action Number 47253. It will be given a new civil number.

MR. MOGILL: Good afternoon, Judge.

We are here this afternoon on the Plaintiff's motion to vacate the guilty plea in this case. This motion is brought pursuant to 28 United States Code Section 2255.

Essentially what is alleged is that the plea was taken in this case did not comply with Rule 11 for the reason that at the time of the taking of the plea, the Defendant was not advised of the special parole provisions of the Federal Drug Act.

THE COURT: Do you have a copy of the transcript of the plea?

MR. MOGILL: I do have. I don't know if I brought it with me. The Government is in agreement.

MR. ZUCKERMAN: Your Honor, for the record, my name is Richard Zuckerman. I am an attorney for the Department of Justice, and I have a copy of the plea if the Court would like to see it.

THE COURT: I have a copy.

[3] I'm sorry, Mr. Zuckerman. Could I see that a moment, please.

MR. ZUCKERMAN: Certainly, Your Honor.

THE COURT: Because I want to address your attention to your motion because I am not able to understand paragraph 3.

In paragraph 3 you say: "When questioned by the Court at the time of his plea, Defendant indicated that he did not understand the consequences of his plea of guilty."

Now, on page 7, if you will turn to the transcript—I take it that what you are referring to is that statement by the Court:

"Now, if I accept your plea of guilty, Mr. Timmreck, you understand what the possible consequences of a plea of guilty to count one of this indictment could be in terms of punishment?"

"THE DEFENDANT: No, sir."

MR. MOGILL: Yes.

THE COURT: But you didn't go on to state what next happened.

I then say:

"THE COURT: Have you been told [4] that you could serve as long as 15 years in jail and be subjected to a substantial fine—and I believe the fine is $25,000. Have you been told that?"

"THE DEFENDANT: I have now, yes."

"THE COURT: Now you know?"

"THE DEFENDANT: Yes."

"THE COURT: I want you to be thoroughly advised as to that because if you wish, knowing that it is possible that if I accept your plea of guilty, that that's what could happen in this case. You would have a right, if you wish at this stage to withdraw your plea."

"THE DEFENDANT: Yes."

"THE COURT: Do you wish to change your mind and not plead?"

"THE DEFENDANT: No."

I am not able to understand what you mean in paragraph 3.

MR. MOGILL: That fact is, Judge, there is no intention on my part or anyone's part of taking anything out of context. Mr. Timmreck was advised of the possibility of the maximum imprisonment; was advised of the possibility of the maximum fine. He was not advised as to the mandatory [5] special parole term.

THE COURT: What do you say to this at page 16—well, we ought to start at the bottom of 15:

"THE COURT: Mr. Mogill, are you of the opinion that there is a factual basis for this plea?"

"MR. MOGILL: Yes, I am."

"THE COURT: And that your client knows full well the consequences of a plea of guilty—or what the consequences of a plea of guilty might be?"

"MR. MOGILL: That is correct."

What were you thinking about when you said that to me?

MR. MOGILL: I think, Judge, when I—

THE COURT: I asked you what you were thinking about.

MR. MOGILL: I am attempting to answer.

THE COURT: Not what Mr. Timmreck was thinking about.

MR. MOGILL: I have no basis for reconstructing my memory in May of 1974. I can only say that, just as I—the Court had no intention to delete—

[6] THE COURT: Did you discuss the possible consequences of the plea or not?

MR. MOGIL: Judge, I have no way of knowing.

THE COURT: Did you or did you not?

MR. MOGILL: I have no way of knowing.

THE COURT: Why did you represent to me, if you did not—

MR. MOGILL: I would like to finish what I had begun to state to the Court.

THE COURT: I would like to hear something other than evasive answers.

MR. MOGILL: I am not attempting to evade. If I could finish the sentence, that, perhaps, could satisfy the Court. If not, I will answer anything the Court asks me.

I have no way of knowing whether I discussed with Mr. Timmreck the requirements of the special parole term. If I didn't, I was in error in advising the Court that I fully advised him of the consequences. I just don't know two years later whether I did or not. And I advised the Court that I had discussed it with him. I have no way of knowing whether or not that discussion included the special parole term.

[7] If I hadn't, it was not an intentional omission on my part. I have no way of knowing what was stated.

THE COURT: Are you finished?

MR. MOGILL: And I am happy to—

THE COURT: Is it a part of your custom to represent a client and not to explain what the implications of his plea of guilty might be in terms of sentencing?

MR. MOGILL: No, Judge.

THE COURT: Don't you follow the practice in every case of doing this?

MR. MOGILL: Judge, I cannot state that I did or did not explain to Mr. Timmreck the requirements of the special parole term in this case.

THE COURT: Dosen't it indicate that you did?

MR. MOGILL: It indicates that. The record speaks for itself. I have no way of supplementing that record.

THE COURT: Let's just say the record speaks for itself.

Let me ask you this: Mr. Timmreck knew, did he not, that he was exposed here by his plea to [8] a sentence for as long as 15 years—

MR. MOGILL: That is correct.

THE COURT: —in custody. And that he could be subjected to a substantial fine, and that was mentioned, $25,000; is that not right?

MR. MOGILL: The record speaks for itself.

THE COURT: In fact, he did not receive a 15 year prison sentence, did he?

MR. MOGILL: He received a ten year sentence.

THE COURT: Right, plus a five-year special parole term.

MR. MOGILL: That is correct.

THE COURT: Justice Stevens—then Justice Stevens of the th Circuit, in talking about that kind of situation, said that there were two problems that were involved in a situation similar to this, and that is whether or not the plea was voluntary, and voluntariness had to be considered at a point in time prior to the sentence, not after the sentence; and secondly, whether or not the sentence, when taken in its entirety was fair. And on the fairness issue, he said this, at page 599 of 517 Federal Reporter 2d. I suppose his opinion is entitled [9] to a little extra persuasiveness since he is now a Justice of the Supreme Court.

On the fairness issue, I think the advice should be compared with the actual sentence rather than with a direct statement of the sentence that might properly have been imposed. As long as the actual sentence was

less than the maximum as described in the Judge's advice, I would find no unfairness and certainly not any unfairness sufficiently grave to qualify as constitutional error.

Now, in Bachnar versus the United States, there was a trial judge's failure to advise the petitioner that he would have to serve a special parole term of at least three years. Judge Stevens said that did not make the plea involuntary, and on the fairness issue he said what I have just read.

Now, how is what is revealed in this transcript unfair to Mr. Timmreck when he was told that his exposure could have been as much as 15 years in jail and he was not sentenced to 15 years in jail. He was sentenced to ten years, and you told me that you had thoroughly advised him of the possible consequences of his guilty plea.

Now, under those circumstances, where is the unfairness in this sentence?

[10] MR. MOGILL: First, I would like to correct what the Court is indicating as to the state of the record. I did not indicate that I had fully advised my client; I indicated I was of the opinion—

THE COURT: Let's read it again.

And that your client full well—and then there is a word deleted—I think there is—that your client knows full well—is the way it reads here—I think the way I said it is that your client full well knows—that your client knows full well what the consequences of a guilty plea might be?

And you say: "That is correct."

What does that mean?

MR. MOGILL: What that means is exactly what it says, that I was of the opinion at that time that my client knew. As I indicated to the Court, I have no way of supplementing the record. The unfairness—

THE COURT: Let's take it your way, that you had an opinion that he knew.

Your opinion, I think, is open to the fair inference that you discussed it with him. That's how you had the opinion. If you didn't have that opinion, you wouldn't

have told me you had it. And you, therefore, obviously have gotten it from having talked about it.

[11] Now, if I told him his exposure was 15 years and he was given 10, and inferentially you told him about the three year parole term, inferentially, and he knew that, where is the unfairness?

MR. MOGILL: There is—I have no recollection one way or the other as to whether or not we discussed the special parole term.

THE COURT: Well, I think I can infer that it was known to him under that state of affairs. Where is the unfairness?

Let's take it the other way. Let's say this doesn't mean anything. Let's delete from the transcript your representation to me that your client was fully informed of the consequences of his plea. Take it out.

MR. MOGILL: You know that I am not asking the Court to take it out. I am satisfied.

THE COURT: Let's take it out, and tell me, if it is taken out, where the unfairness is?

MR. MOGILL: The unfairness arises, Judge, because the Sixth Circuit last year in the Wolak case has stated explicitly that where there is no express indication on the record that a defendant was advised of his—

[12] THE COURT: No, that was not Wolak. Wolak was a situation in which the defendant said to the judge that he didn't understand what that meant and it was not explained to him what it meant. That's what Wolak said.

But I am not asking you that. I am asking you where is the essential unfairness to Mr. Timmreck who pleaded guilty knowing that his exposure might be 15 years in prison and I sentenced him to ten years in prison with the special parole term of five years. Where is the unfairness to Mr. Timmreck in that?

MR. MOGILL: The unfairness arises from the Court at this point in time presuming, in order to sustain the plea, that that additional information would not have made a difference in the Defendant's choice to plead back then. And I think that's a presumption that the Court ought not to indulge in.

THE COURT: You know that sometimes common sense seems to go out the window, and this seems to me one of those times.

What a defendant wants to know more than anything else at the time he makes his plea is what is that number going to be, the time that he will have to spend in jail, not the time on parole, but the time I am going to be in prison. And what he wants to know more [13] than anything else is that number. And I think that that's what I had in mind when I think about it. Where is there that I have been unfair to Mr. Timmreck? Because if I can be persuaded of that, I will, apart from the argument that you make, Mr. Zuckerman, and I will hear you on your argument as to whether or not this can be raised in this form—I understand that you have that argument that you wish to make—but assuming that I had no problem with Mr. Zuckerman's argument under 2255 and could decide that that didn't bar my address of your petition, I would not hesitate to set this plea aside and try Mr. Timmreck again.

I head all of the evidence in connection with another trial; I heard all of the tape recordings. I wouldn't have to judge his guilt or innocence. That would be for a jury. There is much evidence from which that finding, if the jury wished to make it, of guilty, could be found, and he could be resentenced again. I wouldn't hesitate to do that if I thought that I had dealt unfairly with him.

I would say this: That if I had said to him, "You will not be imprisoned for more than ten years," and I had said nothing about a special parole term so that there was at least the possibility that he could have thought that after ten years, plus good time behavior, he [14] would be free of all custodial restraint of one kind or another, it would be unfair. But here, you know —and I know that if he serves this sentence with his good time behavior and whatever extra good time behavior he merits—

MR. MOGILL: He has earned every day that he is entitled to.

THE COURT: Yes. That he would not be in a custodial restraint situation for more than 15 years.

As a matter of fact, it will be significantly less, including the five year special parole term.

Now, looking at it that way, where is the unfairness?

MR. MOGILL: Again, Judge, I think the unfairness arises from the Court putting itself in the position of the Defendant. And I think that while I cannot quarrel with the Court's statement, that a substantial number of defendants are concerned only about the amount of time they would be on the inside, I think to infer that in a particular case that that's the sole motivating factor, to infer in this particular case that the absence of that information would not have been dispositive, would have not made Mr. Timmreck's decision different. I think that that's—that requires the Court to speculate in a way [15] which is unfair to the defendant.

THE COURT: Well, I find that difficult.

You see, I can tell you what my state of mind was at the time of sentencing. And because of the heinousness of this crime, irrespective of what Mr. Timmreck said was the degree of his involvement, this was one of the most heinous drug conspiracies that I have presided in trial of. I heard extensive testimony that last for a long time with regard to five of the co-defendants in this case.

And if I had said to Mr. Timmreck at the time of sentencing, "I will sentence you to the custody of the Attorney General for 15 years and then I will add on a special parole term of five years," that that would be unfair. But my state of mind was this: Since I had addressed him in terms of the exposure of his—and this case was thoroughly discussed in the sentencing counsel—that the intent of this could be met by a ten year sentence plus a five year special parole term. And that he knew because he said he knew.

MR. MOGILL: Well—

THE COURT: He knew that he could be exposed to a custodial restraint of 15 years. And, [16] therefore, I sentenced him to ten years plus the five year special parole term. That's why I say: Where is the unfairness?

MR. MOGILL: It is my position, Judge, that *Wolak*, that *Phillips*, which follows *Wolak*, 519 Federal 2d—regardless of any fundamental unfairness—and I would urge the Court to put itself in this position—excuse me—urge the Court not to put itself in the position of second guessing the Defendant at the fact—but those two cases—

THE COURT: I am not second guessing the Defendant. I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, "You will be subjected to a parole term of at least three years," as far as his guilty plea is concerned. I am not second guessing him because I did not put him in a custodial restraint situation for more than the exposure to which he had knowledge.

And what he was interested in, I'm sure, was what the term in prison would be.

* * * *

SUPREME COURT OF THE UNITED STATES

No. 78-744

UNITED STATES, PETITIONER

v.

CHARLES TIMMRECK

ORDER ALLOWING CERTIORARI. Filed January 8, 1979

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 285489 237

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-744

UNITED STATES OF AMERICA,
Petitioner,

v.

CHARLES TIMMRECK,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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No. 78-744

UNITED STATES OF AMERICA,
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v.

CHARLES TIMMRECK,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

For the reasons stated below, Respondent requests this Court to deny a writ of certiorari in this cause.

COUNTER-STATEMENT OF THE QUESTION

Where, at the time an accused offers a guilty plea, the trial judge fails personally to advise him on the record that a custodial sentence on the charge to which he is pleading guilty must include a special parole term of not less than three (3) years in addition to whatever custodial sentence defendant receives, the defendant has not been fully or accurately advised of the consequences of his plea, in violation of F R Crim P 11, and it is error to deny his motion, brought pursuant to 28 USC § 2255, to vacate that plea.

COUNTER-STATEMENT OF THE CASE

1. On May 24, 1974, Respondent Charles Timmreck pled guilty in the United States District Court for the Eastern District of Michigan to conspiracy to distribute a controlled substance in violation of 21 USC § 846. On September 19, 1974, Mr. Timmreck was sentenced to ten (10) years imprisonment, a five thousand ($5,000.00) dollar committed fine and a special parole term of five (5) years.

On September 13, 1976, pursuant to the provisions of 28 USC § 2255, Mr. Timmreck filed an Amended Motion to Vacate Guilty Plea, alleging that his plea had been accepted in violation of F R Crim P 11 for the reason that the district judge had failed to advise him of the mandatory special parole provisions of 21 USC § 841(b) accompanying any prison sentence for violation of 21 USC § 846. After hearing and oral argument, the district judge on December 3, 1976, entered an Opinion and Order denying Mr. Timmreck's motion. After timely

appeal, the United States Court of Appeals for the Sixth Circuit on June 12, 1978, reversed the judgment of the district court and remanded the cause with instructions to vacate the sentence entered upon the guilty plea and to allow Mr. Timmreck to plead anew.

2. At the time Respondent appeared in court to offer his guilty plea in this case, he was questioned by the district judge as to his understanding of certain of the rights he was waiving. The judge stressed that "what I want to get at and be sure of is that you fully understand what you are doing" (T-4).* He questioned Mr. Timmreck and his attorney as to Mr. Timmreck's understanding of his rights (T-6-7), and he asked Mr. Timmreck about his understanding of the possible punishment, as to which the following colloquy occurred:

> THE COURT: Now, if I accept your plea of guilty, Mr. Timmereck [sic], *do you know what the possible consequences of a plea of guilty to Court I of this Indictment could be in terms of punishment*?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: *Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that*?
>
> THE DEFENDANT: *I have now, yes.*

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* Page references preceded by 'T' refer to pages of the May 24, 1974, guilty plea transcript; page references preceded by 'H' refer to pages of the September 8, 1976, hearing on Respondent's Motion to Vacate.

THE COURT: *Now you know?*

THE DEFENDANT: *Yes, sir.*

THE COURT: I want you to be thoroughly advised as to that, because if you wish, knowing now that it's possible that if I accept your plea of guilty, that that's what could happen in this case. (T-7-8)[1] (emphasis added)

At the conclusion of the hearing, without mention of additional plea consequences in general or the mandatory special parole provisions of 21 USC § 841(b) in particular, the court accepted Mr. Timmreck's plea (T-16).

REASONS FOR DENYING THE WRIT

1. The standard applied by the Court of Appeals in this case is more likely than that proposed by the government to result in fair, uniform and readily administrable application of Rule 11.

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[1] Toward the end of the plea hearing, the court asked Mr. Timmreck's counsel whether he was of the opinion that Mr. Timmreck "knows full well the consequences of a guilty plea might be", to which counsel replied, "That's correct." (T-15-16). At the September 8, 1976, hearing on Respondent's Motion to Vacate the court asked counsel whether he had discussed with Mr. Timmreck the provisons of the special parole term. Although agreeing with the court that it was not a part of his custom not to explain to a client the sentencing implications of a guilty plea, counsel stated that he could not recollect whether he had expressly advised Mr. Timmreck of the special parole requirements involved here (H-3-8).

Because the vast majority of federal indictments are resolved by pleas of guilty, cf. *McCarthy* v *United States*, 394 US 459, 463, 89 SCt 1166, 22 LEd2d 418, 424 (1969) at n 7, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all" accused persons. Notes of the Advisory Committee on 1966 Amendments to F R Crim P. Procedures which do not insure meticulous compliance with Rule 11 threaten the requirement of thorough, knowing voluntariness and consequently jeopardize the integrity of the adversary process itself.

Requiring a § 2255 petitioner to show prejudice is unsound. While a strict compliance standard may sometimes require the granting of relief in a case where a plea has been "truly" voluntary, it is the only way of insuring that relief is granted in all cases where it was not. Moreover, a strict compliance standard guards against unequal application of the more subjective standard urged by the government. As Judge Boreman noted for the Fourth Circuit in *Paige* v *United States*, 443 F2d 781, 783 (4th Cir 1971):

> . . . there is no way by which the effect of the court's misleading statement upon the voluntariness of Paige's guilty plea could be determined. Whether Paige would have elected to plead not guilty and put the government to proof of his guilt had he known the full consequences of pleading guilty to a second narcotics offense is a matter of pure speculation.

See also *McCarthy, supra*, 394 US at 465, 22 LEd2d at 425; *Yazbeck* v *United States*, 524 F2d 641, 643-644 (1st Cir 1975); *Bell* v *United States*, 521 F2d 713, 716-717 (4th Cir 1975) (Widener, J., concurring and dissenting).

Carrying the burden of showing prejudice would also be "an almost impossible task". *United States* v *Carper*, 116 F Supp 817, 820 (DDC 1953) (re violation of F R Crim P 6(d)). Accused persons plead guilty for many reasons, some of them bizarre and irrational even to judges and counsel regularly involved in the criminal process. It is not unreasonable to assume that many defendants calculate their likely sentence as a percentage of their total exposure. In some cases, an accused would in fact have decided to proceed to trial if he or she had known the additional possible prison time faced for violation of special parole, and in most of those cases, the accused will be unable to establish that lack of knowledge of that additional exposure was a substantial circumstance in the decision to plead guilty.

In addition, then-District Judge, now-Circuit Judge Tamm, noted in *Carper, supra*, that a requirement of showing prejudice would also

> undermine the purpose, effectiveness and value of the Criminal Rules by judicial legislation which, in effect, would be saying that the Rules do not mean what they clearly and unequivocally state. *Id.*, 116 F Supp at 819.

It would also make more difficult the achievement of uniform federal criminal procedure. *Id.*, 116 F Supp at 821.

The test applied here should ultimately further rather than hinder the objective of finality and produce less rather than more litigation. By adhering to an objective standard, lower courts will be relieved of time-consuming hearings on the question of prejudice. Counsel for both parties will more readily be able to determine whether an asserted violation is meritorious. Where an objective test is applied, government attorneys will also have an incentive to be fully attentive at guilty plea proceedings and to advise the court of any failures or omissions in the guilty plea record. Cf. *United States* v *Timmreck, supra*, 577 F2d at 377.

At a minimum, resolution of this question by this Court should be deferred until sufficient time has elapsed to determine which test has had a greater effect in producing uniform application of the Rules and in reducing the number of challenges to guilty pleas.

2. The factual record in this case is inadequate to provide this Court with an appropriate case for resolving the conflicts among the circuits. No record was made below of the prejudice suffered by Mr. Timmreck as a result of the trial judge's failure to advise him of the mandatory special parole term. No record was made below as to the reasons for the time lapse between the time of sentencing and the time of filing the § 2255 petition. No record was made concerning the likelihood or unlikelihood that Mr. Timmreck would have withdrawn his plea of guilty had he been advised of the mandatory special parole term by the trial judge.

No record was made concerning the government's present ability to proceed with reprosecution in this case.[2]

CONCLUSION

For all the reasons stated above, the writ should be denied.

Respectfully submitted,

/s/ Kenneth M. Mogill
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Dated: November 27, 1978

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[2] The government did not claim below that its ability to proceed with reprosecution would be impaired if the plea were set aside.

Much of the government's evidence against Mr. Timmreck and his co-defendants was obtained as a result of court-approved electronic surveillance, cf. *United States* v *Schebergen*, 353 F Supp 932 (ED Mich 1973) [Mr. Schebergen was the first-named defendant in this cause], and it is highly unlikely they would be unable to proceed if *certiorari* is denied or the decision of the Court of Appeals is affirmed.

No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-744

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

1. Respondent does not dispute that the courts of appeals have disagreed over the proper resolution of the issue presented in this case or that that issue is of substantial practical importance. Rather, he claims only that "[t]he factual record in this case is inadequate to provide this Court with an appropriate case for resolving the conflicts among the circuits" (Br. in Opp. 7). Contrary to this contention, however, the district court conducted a hearing on respondent's motion to vacate sentence pursuant to 28 U.S.C. 2255 and expressly found that respondent's guilty plea was voluntary, that he received the bargained-for term of imprisonment, and that he was not prejudiced by the court's failure to inform him of the maximum special parole term at the time of the plea (H. 16; Pet. App. 18a, 22a & n. 3). The court of appeals did not disturb these findings. Hence, there is no need for additional factual development before this Court may resolve the legal issue presented.

2. Subsequent to the filing of the petition in this case, the United States Court of Appeals for the Fifth Circuit concluded, contrary to the ruling of the court below, that noncompliance with the requirements of Rule 11 of the Federal Rules of Criminal Procedure does not automatically entitle a defendant to collateral relief from his guilty plea. In *Keel* v. *United States,* No. 77-2019 (Nov. 30, 1978), the defendant had been misinformed at the Rule 11 proceeding that he could be sentenced to 45 years', instead of 25 years', imprisonment, but he actually received the 12-year prison sentence for which he had bargained. The district court denied Section 2255 relief, finding that the erroneous information had not prejudiced the defendant or affected the voluntariness of his plea, and the court of appeals affirmed.

The Fifth Circuit, sitting en banc, unanimously "reject[ed] the application of a *per se* rule, which would permit the defendant to withdraw his plea merely because the district court had not literally complied with the requirements of Rule 11, Fed. R. Crim. P." (slip op. 1226). It held, consistent with the government's position in this case, that "when a collateral attack is made on a guilty plea for failure of the district court to literally comply with * * * Rule 11, the defendant must show prejudice in order to qualify for § 2255 relief. In the absence of a fundamental defect which inherently results in the miscarriage of justice, or an omission inconsistent with the demands of fair procedure, relief cannot be given in a collateral attack on a guilty plea conviction based on failure of Rule 11 compliance when the plea was taken" (*id.* at 1226-1227). These principles are controlling here.[1]

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[1]We are lodging 10 copies of the *Keel* opinion with the Clerk of this Court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

WADE H. MCCREE, JR.
Solicitor General

DECEMBER 1978

DOJ-1978-12

No. 78-744

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

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v.

CHARLES TIMMRECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is reported at 577 F.2d 372. The memorandum opinion of the district court (Pet. App. 15a-23a) is reported at 423 F. Supp. 537.

JURISDICTION

The judgment of the court of appeals (Pet. App. 13a) was entered on June 12, 1978. A petition for rehearing was denied on August 7, 1978 (Pet. App.

14a). On October 26, 1978, Mr. Justice Stewart extended the time within which to file a petition for a writ of certiorari to and including November 16, 1978. The petition was filed on November 3, 1978, and was granted on January 8, 1979 (App. 27). The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether a defendant may obtain collateral relief from his conviction under 28 U.S.C. 2255 solely because the district court violated Rule 11 of the Federal Rules of Criminal Procedure in accepting his guilty plea.

STATUTE AND RULE INVOLVED

28 U.S.C. 2255 provides in pertinent part:

> A prisoner in custody under sentence of a court established by Act of Congress claiming the right to be released upon the ground that the sentence was imposed in violation of the Constitution or laws of the United States, or that the Court was without jurisdiction to impose such sentence, or that the sentence was in excess of the maximum authorized by law, or is otherwise subject to collateral attack, may move the court which imposed the sentence to vacate, set aside or correct the sentence.

At the time of respondent's guilty plea, Rule 11 of the Federal Rules of Criminal Procedure provided:

> A defendant may plead not guilty, guilty, or, with the consent of the court, *nolo contendere*. The court may refuse to accept a plea of guilty,

> and shall not accept such plea or a plea of *nolo contendere* without first addressing the defendant personally and determining that the plea is made voluntarily with understanding of the nature of the charge and the consequence of the plea.

Rule 11(c) now provides:

> Advice to Defendant. Before accepting a plea of guilty or nolo contendere, the court must address the defendant personally in open court and inform him of, and determine that he understands, the following:
>
> (1) the nature of the charge to which the plea is offered, the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law; and
>
> (2) if the defendant is not represented by an attorney, that he has the right to be represented by an attorney at every stage of the proceeding against him and, if necessary, one will be appointed to represent him; and
>
> (3) that he has the right to plead not guilty or to persist in that plea if it has already been made, and he has the right to be tried by a jury and at that trial has the right to the assistance of counsel, the right to confront and cross-examine witnesses against him, and the right not to be compelled to incriminate himself; and
>
> (4) that if he pleads guilty or nolo contendere there will not be a further trial of any kind, so that by pleading guilty or nolo contendere he waives the right to a trial; and

(5) that if he pleads guilty or nolo contendere, the court may ask him questions about the offense to which he has pleaded, and if he answers these questions under oath, on the record, and in the presence of counsel, his answers may later be used against him in a prosecution for perjury or false statement.

STATEMENT

1. A 19-count indictment filed on May 19, 1972, in the United States District Court for the Eastern District of Michigan charged respondent and 21 co-defendants with conspiracy to manufacture and distribute, and to possess with intent to distribute, heroin, cocaine, LSD, and other controlled substances, in violation of 21 U.S.C. 846, and with various substantive narcotics offenses, in violation of 21 U.S.C. 841(a)(1) and 843(b). On May 24, 1974, pursuant to a plea bargain whereby the remaining charges against him would be dismissed and the government would not prosecute him for a bail violation, respondent offered to plead guilty to the conspiracy count of the indictment.

At the outset of the guilty plea proceeding required by Rule 11 of the Federal Rules of Criminal Procedure, the prosecutor disclosed the existence and terms of the plea agreement (App. 2). The district court then questioned respondent and determined that he was not suffering from any physical or mental impairment, that he was fully aware of what he was doing, and that he understood the constitutional rights

that he would waive by pleading guilty (App. 3-4). The court informed respondent that he could be sentenced to a maximum of 15 years' imprisonment and a $25,000 fine if the plea were accepted,[1] but it failed to mention that respondent would also be subject to a mandatory special parole term of at least three years.[2]

---

[1] The pertinent colloquy was as follows (App. 4-5):

THE COURT: Now, if I accept your plea of guilty, Mr. Timmreck, do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of imprisonment?
THE DEFENDANT: No, sir.
THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?
THE DEFENDANT: I have now, yes.
THE COURT: Now you know?
THE DEFENDANT: Yes, sir.

* * * * *

THE COURT: And I want you to know that while I don't know what the sentence will be in your case, I want you to know what the outer limits might be.
THE DEFENDANT: Yes, sir.
THE COURT: You understand that?
THE DEFENDANT: Yes, sir.

[2] Section 401(b) of the Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1261, 21 U.S.C. 841(b), provides that persons convicted of a violation of the Act must be given a term of "special parole," in addition to any other sentence imposed. The special parole term, which must be at least two, three, or four years in length (depending on the nature of the offense) and which may be as long as life (see, *e.g.*, *United States* v. *Walden*, 578 F.2d 966, 972 (3d Cir. 1978); *United States* v. *Jones*, 540 F.2d 465, 468 (10th Cir. 1976), cert. denied, 429 U.S. 1101 (1977); *United States* v. *Rivera-Marquez*, 519 F.2d 1227, 1228-1229

After the court outlined the nature of the charges, respondent explained his involvement in the conspiracy and confessed to his guilt (App. 6-8). Respondent acknowledged that he had not been forced or threatened to plead guilty and that no promises had been made in exchange for the plea other than those contained in the plea bargain (App. 9). Respondent's counsel advised the court that he was satisfied that there was a factual basis for the plea and that respondent knew "full well the consequences of a guilty plea * * *" (App. 9). The court then accepted respondent's plea of guilty, finding that the plea was entered voluntarily with a full understanding of its possible consequences and was supported by a factual basis (App. 9-10). Thereafter, on September 19, 1974, respondent was sentenced to 10 years' imprisonment, to be followed by five years' special parole, and to a $5,000 fine.

2. Respondent did not appeal. Approximately two years after sentencing, on August 10, 1976, respond-

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(9th Cir.), cert. denied, 423 U.S. 949 (1975); *United States* v. *Rich*, 518 F.2d 980, 987 (8th Cir. 1975), cert. denied, 427 U.S. 907 (1976)), "is separate from and begins *after* the usual sentence terminates, including any period of supervision. In the event an individual should violate during the period of supervision prior to the beginning of the SPT [Special Parole Term], he will be returned as a violator of the basic period of supervision with the SPT still to follow unaffected." Bureau of Prisons Policy Statement 7500.43 at 2 (January 18, 1973). If a defendant violates the conditions of special parole, he may be returned to prison to serve the entire special parole term, not merely the unexpired portion. 21 U.S.C. 841(c).

ent moved to vacate his sentence under 28 U.S.C. 2255, alleging for the first time that the district court had violated Rule 11, Fed. R. Crim. P., by failing to inform him of the mandatory special parole term at the time his plea was entered. The motion did not assert that respondent had actually been unaware of the special parole provision or that, if he had been notified of it by the trial judge, he would not have pleaded guilty.[3]

The district court held a hearing on respondent's Section 2255 motion on September 8, 1976. At the hearing, respondent's counsel stated that he could not recall whether he had discussed the special parole term with respondent prior to entry of his guilty plea (App. 20), but he did acknowledge that, before a client pleaded guilty, it was his practice to review with the client the possible sentences that could be imposed (App. 20-21). Counsel also admitted that he had represented to the court at the Rule 11 proceeding that respondent was fully aware of the consequences of his plea (App. 22-23).

The district court denied respondent's motion to vacate sentence. Although it agreed that the record of the guilty plea proceeding did not reflect that respondent had been told of the mandatory special parole provisions (Pet. App. 16a), the court con-

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[3] Respondent's motion was initially filed as part of the criminal proceedings. On September 13, 1976, respondent filed an "Amended Motion to Vacate Guilty Plea," bearing the civil number assigned to the case and designating himself as plaintiff and the United States as defendant (App. 11-13). The motion was otherwise unchanged.

cluded that respondent had not been prejudiced by the omission and that he therefore was not entitled to collateral relief from his conviction. The court observed that respondent's total sentence did not exceed the maximum sentence that he was informed he could receive as a result of his guilty plea (*id.* at 18a). In addition, the court found that respondent's plea had been entered voluntarily and that the technical defect had not influenced the plea or resulted in any fundamental unfairness (*id.* at 22a). In making this determination, the court expressly relied on defense counsel's assurance at the Rule 11 proceeding that he had advised respondent about the possible consequences of his guilty plea and on the fact that two years had elapsed between respondent's sentencing, when the Rule 11 violation should have been apparent to him and his attorney, and the filing of the Section 2255 motion (*id.* at 22a n.3).

3. The court of appeals reversed and remanded with instructions to vacate the sentence entered upon the guilty plea and to allow respondent to plead anew. Finding that the district court's ruling was "squarely contrary" to *United States* v. *Wolak*, 510 F.2d 164 (6th Cir. 1975), the court of appeals held that the mandatory special parole term was a direct consequence of a guilty plea, that the district court had therefore violated Rule 11 in failing to advise respondent of that consequence of his plea, and that (relying on *McCarthy* v. *United States*, 394 U.S. 459 (1969)) the proper remedy for such noncompliance

was to allow respondent to withdraw the plea (Pet. App. 1a-12a).

The court recognized (Pet. App. 10a) that *McCarthy* involved a *direct* appeal from a conviction entered upon a guilty plea and that this Court had subsequently remarked in *Davis* v. *United States*, 417 U.S. 333 (1974), that the failure to comply with the formal requirements of a rule of criminal procedure does not warrant *collateral* relief absent a showing of " 'a fundamental defect which inherently results in a complete miscarriage of justice' " (417 U.S. at 346, quoting *Hill* v. *United States*, 368 U.S. 424, 428 (1962)). It further acknowledged that "at first blush the Rule 11 violation at issue here does not seem to rise to the level" required to satisfy the *Davis* test (Pet. App. 9a). The court resolved the conflict by holding that prejudice inheres in every failure to comply with Rule 11 and that such claims are therefore cognizable in a Section 2255 proceeding (*id.* at 10a).

SUMMARY OF ARGUMENT

A district court's failure to observe the formal requirements of Rule 11 of the Federal Rules of Criminal Procedure in accepting a defendant's guilty plea is a defect cognizable only on direct appeal, not on collateral attack.

A. The writ of habeas corpus has traditionally been available to test the legality of confinement. At the time the Constitution was adopted, however, the writ could be used solely to verify the jurisdiction of

the sentencing court. Construing the habeas corpus provisions of the Judiciary Act of 1789 in *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 203 (1830), Chief Justice Marshall wrote that "[a]n imprisonment under a judgment cannot be unlawful, unless that judgment be an absolute nullity; and it is not a nullity if the court has general jurisdiction of the subject, although it should be erroneous."

An expansion of the statutory language in 1867, together with emerging concepts of due process in criminal proceedings, eventually led the Court to discard the concept of jurisdiction as the touchstone for access to federal post-conviction relief and to acknowledge that such relief is available for claims of "disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942). As the Court remarked in *Fay* v. *Noia*, 372 U.S. 391, 409 (1963), "[t]he course of decisions * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction."

The present federal habeas corpus statute, 28 U.S.C. 2255, allows a prisoner to assert not only constitutional and jurisdictional claims, but also claims founded upon "the laws of the United States." By contrast to the steady expansion of the substantive scope of the writ in regard to constitutional claims, however, "there has been no change in the established

rule with respect to nonconstitutional claims" (*Stone* v. *Powell*, 428 U.S. 465, 477 n.10 (1976)), which is that "the writ of habeas corpus is not designed for collateral review of errors committed by the trial court" and "will not be allowed to do service for an appeal" (*Sunal* v. *Large*, 332 U.S. 174, 178, 179 (1947)).

Hence, the Court has repeatedly emphasized that "'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." Absent a mistake of constitutional or jurisdictional dimensions, "the appropriate inquiry [is] whether the claimed error of law was 'a fundamental defect which inherently results in a complete miscarriage of justice' * * *." *Davis* v. *United States*, 417 U.S. 333, 346 (1974), quoting *Hill* v. *United States*, 368 U.S. 424, 428-429 (1962).

B. Respondent's Section 2255 motion, which is based solely upon a technical violation of Rule 11, does not raise the sort of claim cognizable on collateral attack. The failure to inform respondent of the special parole provisions at the time of his guilty plea did not implicate any constitutional rights or jurisdictional defects and amounted to no more than a violation of a rule of criminal procedure. Moreover, it is not manifestly unjust to hold respondent to his plea. His motion to vacate sentence did not allege that he was actually unaware of the special parole pro-

visions, much less that he would not have pleaded guilty if he had been fully informed of this consequence of his plea, and the district court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea bargain. In addition, respondent's sentence, even with the inclusion of five years' special parole, does not exceed the term of imprisonment that he was advised he could receive if he pleaded guilty.

Finally, respondent's Section 2255 motion does not present "exceptional circumstances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). Since the trial judge's failure to follow Rule 11 should have been immediately apparent to respondent and his counsel at sentencing, this is not a case where "the facts relied on were dehors the record and therefore not open to consideration and review on appeal." *Sunal* v. *Large*, *supra*, 332 U.S. at 177.

The strong societal interest in the finality of judgments suggests that, in this situation, respondent should have challenged the Rule 11 error on direct appeal or not at all. Permitting a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceeding for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution on the underlying offense may be difficult or impossible. As the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

ARGUMENT

A DEFENDANT IS NOT ENTITLED TO COLLATERAL RELIEF FROM HIS CONVICTION UNDER 28 U.S.C. 2255 MERELY BECAUSE THE DISTRICT COURT VIOLATED RULE 11 OF THE FEDERAL RULES OF CRIMINAL PROCEDURE IN ACCEPTING HIS GUILTY PLEA

In *McCarthy* v. *United States*, 394 U.S. 459, 472 (1969), this Court held that "a defendant whose plea has been accepted in violation of Rule 11 [of the Federal Rules of Criminal Procedure] should be afforded the opportunity to plead anew * * *." It is undisputed that, at the time he pleaded guilty, respondent was not advised of the mandatory special parole term, which we acknowledge to be a "consequence of the plea."[4] In reliance on *McCarthy*, the

[4] Respondent's guilty plea was entered under the 1966 version of Rule 11, which required the district court to determine that the defendant understood "the consequences of the plea." Effective December 1, 1975, Rule 11(c)(1) was amended to require the court, before accepting a plea of guilty or nolo contendere, to inform the defendant on the record of "the mandatory minimum penalty provided by law, if any, and the maximum possible penalty provided by law * * *." This change was intended to eliminate confusion over what is a direct "consequence" of a guilty plea. See Note, *Rule 11 and Collateral Attack on Guilty Pleas*, 86 Yale L. J. 1395, 1397 n.9 (1977). As the Advisory Committee re-

court of appeals concluded that the omission entitled respondent to vacate his conviction under 28 U.S.C. 2255 and to plead anew (Pet. App. 3a-4a).

The court of appeals' decision ignores the essential distinction between direct and collateral attacks upon a conviction. The ruling in *McCarthy* was announced in the context of a direct appeal from a conviction entered after a guilty plea proceeding conducted in gross disregard of the requirements of Rule 11. Respondent, by contrast, did not appeal his conviction. Instead, he raised the Rule 11 violation for the first time years later on a motion to vacate sentence pursuant to Section 2255, which permits a federal prisoner to assert a claim that his confinement is "in violation of the Constitution or the laws of the United States." Because of the "strong interest in preserving the finality of judgments" (*Henderson* v. *Kibbe*, 431 U.S. 145, 154 n.13 (1977)), the crucial question in a

marked, "[t]he objective is to insure that a defendant knows what minimum sentence the judge must impose and what maximum sentence the judge may impose. This information is usually readily ascertainable from the face of the statute defining the crime, and thus it is feasible for the judge to know specifically what to tell the defendant. Giving this advice tells a defendant the shortest mandatory sentence and also the longest possible sentence for the offense to which he is pleading guilty." 62 F.R.D. 271, 279 (1974). Hence, we do not dispute that failure to notify a defendant pleading guilty to a controlled substance offense of the mandatory special parole term would constitute a violation of the new Rule 11. See *United States* v. *Del Prete*, 567 F.2d 928, 929 (9th Cir. 1978). But see *United States* v. *Broussard*, 582 F.2d 10, 12 (5th Cir. 1978), cert. denied, No. 78-915 (Feb. 26, 1979); *United States* v. *Adams*, 566 F.2d 962, 969 (5th Cir. 1978).

proceeding under Section 2255 is not whether "errors of law [were] committed by the trial court" but whether the defendant's confinement offends the Constitution (*Sunal* v. *Large*, 332 U.S. 174, 179, 181-182 (1947)) or otherwise presents "exceptional circumtances where the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Bowen* v. *Johnston*, 306 U.S. 19, 27 (1939). Thus, merely because the district court's failure to comply with the requirements of Rule 11 might have permitted respondent to withdraw his plea if the defect had been raised on direct appeal,[5] it does not follow that the same relief should be available in a collateral attack on the conviction.

A. A Failure to Comply with the Formal Requirements of a Federal Rule of Criminal Procedure, Without More, Is Not Cognizable under 28 U.S.C. 2255

This Court has frequently had occasion to examine the common-law scope of the writ of habeas corpus and its historical development in England and the United States.[6] See, *e.g.*, *Wainwright* v. *Sykes*, 433

[5] Although the Court need not reach the issue in this case, we question whether the technical Rule 11 defect involved here, which resulted in no prejudice to respondent, should require a court to set aside respondent's guilty plea even on direct appeal. See page 33 note 19, *infra*.

[6] As "the modern postconviction procedure available to federal prisoners" (*Stone* v. *Powell*, 428 U.S. 465, 479 (1976)), 28 U.S.C. 2255 is intended to provide a remedy "exactly commensurate with that which had previously been available by habeas corpus" (*Hill* v. *United States*, 368 U.S. 424, 427

U.S. 72, 77-80 (1977); *Stone* v. *Powell*, 428 U.S. 465, 474-482 (1976); *Kaufman* v. *United States*, 394 U.S. 217, 221-224 (1969); *Fay* v. *Noia*, 372 U.S. 391, 399-415 (1963); *United States* v. *Hayman*, 342 U.S. 205, 210-213 (1952). Although the appropriate scope of the writ in modern times has been the subject of some dispute both within the Court [7] and among legal commentators [8] and cannot easily be compressed into a rigid rule or set formula, it is apparent from even a brief review of the Court's decisions that the reach of Section 2255 has never been thought to extend to claims such as that respondent has presented in this case.

1. At the time the Constitution was adopted, the rule at common law was that "once a person had been convicted by a superior court of general jurisdiction, a court disposing of a habeas corpus petition could not go behind the conviction for any purpose other

(1962)) "and has been construed in accordance with that design" (*Blackledge* v. *Allison*, 431 U.S. 63, 74 n.4 (1977)). See *United States* v. *MacCollom*, 426 U.S. 317, 322 (1976); *Davis* v. *United States*, 417 U.S. 333, 343-344 (1974).

[7] See, *e.g.*, *Davis* v. *United States*, *supra*, 417 U.S. at 350-368 (Rehnquist, J., dissenting); *Fay* v. *Noia*, *supra*, 372 U.S. at 448-476 (Harlan, J., dissenting); *Sunal* v. *Large*, *supra*, 332 U.S. at 184-187 (Frankfurter, J., dissenting).

[8] See, *e.g.*, Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451 (1966); Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, 76 Harv. L. Rev. 441 (1963); Mayers, *The Habeas Corpus Act of 1867: The Supreme Court as Legal Historian*, 33 U. Chi. L. Rev. 31 (1965); Note, *Developments in the Law—Federal Habeas Corpus*, 83 Harv. L. Rev. 1038 (1970). See also P. Bator, P. Mishkin, D. Shapiro, & H. Wechsler, *Hart & Wechsler's The Federal Courts and the Federal System*, ch. X, at 1424-1538 (2d ed. 1973).

than to certify the formal jurisdiction of the committing court." Oaks, *Legal History in the High Court—Habeas Corpus*, 64 Mich. L. Rev. 451, 468 (1966). As the Court stated in *United States* v. *Hayman*, *supra*, 342 U.S. at 210-211:

> Although the objective of the Great Writ long has been the liberation of those unlawfully imprisoned, at common law a judgment of conviction rendered by a court of general criminal jurisdiction was conclusive proof that confinement was legal. Such a judgment prevented issuance of the writ without more.

The early decisions of this Court reflected a similar understanding. See *Ex parte Kearney*, 20 U.S. (7 Wheat.) 38, 44-45 (1822); *Ex parte Watkins*, 28 U.S. (3 Pet.) 193, 202-203 (1830); *Ex parte Watkins*, 32 U.S. (7 Pet.) 568, 574 (1833); *Ex parte Yerger*, 75 U.S. (8 Wall.), 85, 101 (1868). See also *Frank* v. *Mangum*, 237 U.S. 309, 329-331 (1915).[9]

[9] In *Ex parte Siebold*, 100 U.S. 371 (1879), the scope of habeas corpus was broadened to include claims that the defendant had been convicted under an unconstitutional statute. However, the Court was careful, to use Judge Friendly's phrase, "to kiss the jurisdictional book." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, 38 U. Chi. L. Rev. 142, 151 (1970). "[I]f the laws are unconstitutional and void," Justice Bradley wrote in *Siebold*, "the Circuit Court acquired no jurisdiction of the causes." 100 U.S. at 377. Indeed, as late as 1938 the Court felt the need to justify the grant of habeas corpus relief to a defendant who had been convicted without the assistance of counsel by stating that "compliance with [the Sixth Amendment's] mandate is an essential jurisdictional prerequisite to a federal court's authority to deprive an accused of his life or liberty." *Johnson* v. *Zerbst*, 304 U.S. 458, 467.

In 1867, Congress expanded the statutory language so as to make the writ available to state as well as federal prisoners. Act of February 5, 1867, ch. 28, 14 Stat. 385. Under this statute, federal courts were authorized to grant relief in "all cases where any person may be restrained of his or her liberty in violation of the constitution, or of any treaty or law of the United States * * *." Although the limitation of federal habeas corpus to considerations of jurisdiction continued to persist for some time, the broadened language of the 1867 statute, together with emerging concepts of due process, led the Court eventually to acknowledge that "the use of the writ in the federal courts to test the constitutional validity of a conviction for crime is not restricted to those cases where the judgment of conviction is void for want of jurisdiction of the trial court to render it. It extends also to those exceptional cases where the conviction has been in disregard of the constitutional rights of the accused, and where the writ is the only effective means of preserving his rights." *Waley* v. *Johnston*, 316 U.S. 101, 104-105 (1942). See *Moore* v. *Dempsey*, 261 U.S. 86 (1923); *Mooney* v. *Holohan*, 294 U.S. 103 (1935); *Johnson* v. *Zerbst*, 304 U.S. 458 (1938); *Walker* v. *Johnson*, 312 U.S. 275 (1941); *Adams* v. *United States ex rel McCann*, 317 U.S. 269 (1942); *House* v. *Mayo*, 324 U.S. 42 (1945); *Von Moltke* v. *Gillies*, 332 U.S. 708 (1948); *Price* v. *Johnston*, 334 U.S. 266 (1948); *Brown* v. *Allen*, 344 U.S. 443 (1953). The Court reviewed this background in *Fay* v. *Noia*, 372 U.S. 391 (1963), and

concluded that "[t]he course of decisions * * * makes plain that restraints contrary to our fundamental law, the Constitution, may be challenged on federal habeas corpus even though imposed pursuant to the conviction of a federal court of competent jurisdiction." *Id.* at 409 (footnote omitted).

Section 2255, of course, allows a prisoner to assert not only constitutional and jurisdictional claims, but also claims founded upon "the laws of the United States." However, by contrast to the steady expansion of the substantive scope of the writ in regard to constitutional claims, "there has been no change in the established rule with respect to nonconstitutional claims" (*Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10), which is that "[t]he writ of habeas corpus * * * 'will not be allowed to do service for an appeal' " (*ibid.*, quoting *Sunal* v. *Large*, *supra*, 332 U.S. at 178). Because "the writ is not designed for collateral review of errors of law committed by the trial court * * *" (*Sunal* v. *Large*, *supra*, 332 U.S. at 179), "not * * * every asserted error of law can be raised on a § 2255 motion." *Davis* v. *United States*, *supra*, 417 U.S. at 346. In general, "nonconstitutional claims that could have been raised on appeal, but were not, may not be asserted in collateral proceedings." *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10. See also *Davis* v. *United States*, *supra*, 417 U.S. at 345-346; *Kaufman* v. *United States*, *supra*, 394 U.S. at 223 n.7; *Sunal* v. *Large*, *supra*, 332 U.S. at 178-179.

In *Sunal* v. *Large*, *supra*, for example, two defendants were found guilty of failing to submit to induc-

tion into the Army, but neither appealed his conviction. Nine months later, this Court held in *Estep* v. *United States*, 327 U.S. 114 (1946), that the statutory defense that the district court had barred the defendants from raising at trial should have been allowed. Defendants immediately sought relief under Section 2255, but the Court held that the error was correctable only by direct appeal, not on collateral attack.[10] In denying habeas corpus relief, Justice Douglas observed for the Court (332 U.S. at 182):

> Every error is potentially reversible error; and many rulings of the trial court spell the difference between conviction and acquittal. If defendants who accept the judgment of conviction and do not appeal can later renew their attack on the judgment by *habeas corpus*, litigation in these criminal cases will be interminable. Wise judicial administration of the federal courts counsels against such course, at least where the error does not trench on any constitutional rights of defendants nor involve the jurisdiction of the trial court.

The Court reemphasized these important principles in *Hill* v. *United States*, 368 U.S. 424 (1962). There the question presented was "whether a district court's failure explicitly to afford a defendant an opportunity

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[10] Even the dissenting Justices in *Sunal* agreed that trial errors ordinarily would not fall within the scope of habeas corpus and that the writ should be reserved for instances in which it is necessary "to prevent a complete miscarriage of justice." 332 U.S. at 187 (Frankfurter, J., dissenting); *id.* at 188 (Rutledge, J., dissenting).

to make a statement at the time of sentencing furnishe[d], without more, grounds for a successful collateral attack upon the judgment and sentence." *Id.* at 426 (footnote omitted). Although the right of allocution was expressly guaranteed to a defendant by Rule 32(a) of the Federal Rules of Criminal Procedure and was deemed to be an ancient and valuable one (*Green* v. *United States*, 365 U.S. 301, 304 (1961)), and although a violation of Rule 32(a) necessitated vacation of the sentence when raised on direct appeal (*Van Hook* v. *United States*, 365 U.S. 609 (1961)), the Court denied relief under Section 2255, holding that "collateral relief is not available when all that is shown is a failure to comply with the formal requirements of the Rule." 368 U.S. at 429 (footnote omitted). The Court explained (*id.* at 428):

> The failure of a trial court to ask a defendant represented by an attorney whether he has anything to say before sentence is imposed is not of itself an error of the character or magnitude cognizable under a writ of *habeas corpus*. It is an error which is neither jurisdictional nor constitutional. It is not a fundamental defect which inherently results in a complete miscarriage of justice, nor an omission inconsistent with the rudimentary demands of fair procedure. It does not present "exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent." *Bowen v. Johnston*, 306 U.S. 19, 27.

See also *Machibroda* v. *United States*, 368 U.S. 487, 489 (1962).

This standard was applied most recently in *Davis* v. *United States*, *supra*, which involved a change in the substantive law applicable to the defendant's case, rather than a procedural error. Although the Court expressly reaffirmed the traditional limitation on the scope of habeas corpus for nonconstitutional errors (417 U.S. at 346), it held that "[t]here can be no room for doubt that" the claim of an intervening change in law, under which the act for which the defendant had been convicted was no longer criminal, constitutes "a circumstance [that] 'inherently results in a complete miscarriage of justice' and 'present[s] exceptional circumstances' that justify collateral relief under § 2255." *Id.* at 346-347.[11]

These decisions clearly indicate that while Section 2255 encompasses claims of legal, as well as jurisdictional and constitutional, error, the applicable standard is no less stringent than the notion of fairness embodied in the Due Process Clause. Under the test articulated in *Hill*, a conviction entered on the basis of a procedural error sufficiently serious to be characterized as "a fundamental defect which inherently results in a complete miscarriage of justice" would approach or amount to a deprivation of due process and would justify habeas corpus relief. And

[11] *Davis* distinguished *Sunal* on the grounds that the defendants in *Sunal* had not appealed their convictions and that *Sunal* was not a case in which the law had changed after the time for appeal had expired. 417 U.S. at 345. As we discuss below (see pages 26, 33-36, *infra*), this case resembles *Sunal* on both scores.

Davis merely applied the same "standard * * * to substantive matters not protected by the Constitution." *Bachner* v. *United States*, 517 F.2d 589, 598-599 (7th Cir. 1975) (Stevens, J., concurring). At all events, the appropriate inquiry on collateral attack is not whether an error of law may have been committed, as would be the case on direct review, but whether the "resulting conviction violates due process." *Cupp* v. *Naughten*, 414 U.S. 141, 147 (1973). See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154.

3. The policy reasons that underlie the distinction in post-conviction remedies between constitutional and nonconstitutional claims are not difficult to perceive. Resort to the writ "results in serious intrusions on values important to our system of government [including] the most effective utilization of limited judicial resources [and] the necessity of finality in criminal trials * * *." *Stone* v. *Powell*, *supra*, 428 U.S. at 491 n.31.[12] While the consideration of finality of judgments has different force in civil and criminal contexts, it is in basic harmony with the goals of deterrence and rehabilitation embodied in the criminal justice system:

> No effective judicial system can afford to concede the continuing theoretical possibility that there is error in every trial and that every incarceration is unfounded. At some point the

[12] See generally Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, *supra*, 38 U. Chi. L. Rev. at 146-151; Bator, *Finality in Criminal Law and Federal Habeas Corpus for State Prisoners*, *supra*, 76 Harv. L. Rev. at 444-453.

> law must convey to those in custody that a wrong has been committed, that consequent punishment has been imposed, that one should no longer look back with the view to resurrecting every imaginable basis for further litigation but rather should look forward to rehabilitation and to becoming a constructive citizen.

Schneckloth v. *Bustamonte*, 412 U.S. 218, 262 (1973) (Powell, J., concurring). See *Sanders* v. *United States*, 373 U.S. 1, 24-25 (1963) (Harlan, J., dissenting).

Habeas corpus proceedings also drain scarce community legal resources, including judges, prosecutors, appointed defense counsel and even courtrooms:

> Those resources are limited but demand on them constantly increases. There is an insistent call on federal courts both in civil actions, many novel and complex, which affect intimately the lives of great numbers of people and in original criminal trials and appeals which deserve our most careful attention. To the extent the federal courts are required to re-examine claims on collateral attack, they deprive primary litigants of their prompt availability and mature reflection. After all, the resources of our system are finite: their overextension jeopardizes the care and quality essential to fair adjudication.

Schneckloth v. *Bustamonte*, *supra*, 412 U.S. at 260-261 (Powell, J., concurring) (footnotes omitted). Finally, because collateral attack may be long delayed, it is frequently difficult to determine with reliability the factual issue giving rise to the attack. Cf. Rule

9(a), Rules Governing Section 2255 Proceedings, 28 U.S.C. 2255. And although a successful attack generally entitles the defendant only to a retrial, a long delay often makes another trial impossible because witnesses may die, memories may fade, or evidence may be lost or released. See *Peyton* v. *Rowe*, 391 U.S. 54, 62-63 (1968).

While society may be willing to incur these costs in order to correct errors of constitutional magnitude or to benefit a prisoner who has been "grievously wronged" (*Fay* v. *Noia*, *supra*, 372 U.S. at 441), where "the writ is the only effective means of preserving his rights" (*Waley* v. *Johnston*, *supra*, 316 U.S. at 104-105), the competing considerations outlined above surely dictate a contrary result in cases of nonconstitutional violations, especially when those violations could have been challenged on direct appeal. In sum, " 'collateral relief is not available when all that is shown is a failure to comply with the formal requirements' of a rule of criminal procedure in the absence of any indication that the defendant was prejudiced by the asserted technical error." *Davis* v. *United States*, *supra*, 417 U.S. at 346, quoting *Hill* v. *United States*, *supra*, 368 U.S. at 429.

B. The Rule 11 Violation in This Case Does Not Entitle Respondent to Relief under 28 U.S.C. 2255

1. Viewed against the background of the scope of habeas corpus, it is apparent that respondent's Section 2255 motion, which was based solely on a technical violation of Rule 11 without any allegation or proof of prejudice, does not raise the sort of claim that may

be recognized on collateral attack. A claim of this nature does not relate to rights protected by the Constitution, but rather is founded in the "laws of the United States," here, the procedures set forth in Rule 11. See App. 11. Moreover, because "[t]he error was of record," it does not present "a situation where the facts relied on were dehors the record and therefore not open to consideration and review on appeal." *Sunal* v. *Large*, *supra*, 332 U.S. at 177. Compare *Waley* v. *Johnston*, *supra*, 316 U.S. at 104. Nor is this a case where "the law was changed after the time for appeal had expired." *Sunal* v. *Large*, *supra*, 332 U.S. at 181. See *Davis* v. *United States*, *supra*, 417 U.S. at 346-347. Accordingly, respondent's objection amounts to no more than a "nonconstitutional claim that could have been raised on appeal, but [was] not," and therefore "may not be asserted in collateral proceedings." *Stone* v. *Powell*, *supra*, 428 U.S. at 477 n.10.[13]

[13] This conclusion is supported by the decisions of six courts of appeals which, in reliance on *Davis* and *Hill*, have held that a defendant may not obtain Section 2255 relief merely because the district court violated Rule 11 in accepting his guilty plea. See, *e.g.*, *Keel* v. *United States*, 585 F.2d 110 (5th Cir. 1978) (en banc); *United States* v. *White*, 572 F.2d 1007 (4th Cir. 1978); *United States* v. *Hamilton*, 553 F.2d 63 (10th Cir.), cert. denied, 434 U.S. 834 (1977); *Del Vecchio* v. *United States*, 556 F.2d 106 (2d Cir. 1977); *McRae* v. *United States*, 540 F.2d 943 (8th Cir. 1976), cert. denied, 429 U.S. 1045 (1977); *Bachner* v. *United States*, 517 F.2d 589 (7th Cir. 1975). Cf. *Horsley* v. *United States*, 583 F.2d 670 (3d Cir. 1978) (adopting the *Hill* and *Davis* standard but holding that the failure adequately to inform a defendant of the nature of the charges against him, unlike a failure to mention the maximum possible punishment, is inherently prejudicial).

Although the First and Ninth Circuits have granted Section 2255 relief in circumstances similar to this case (see *United States* v. *Yazbeck*, 524 F.2d 641 (1st Cir. 1975); *Bunker* v. *Wise*, 550 F.2d 1155 (9th Cir. 1977)), neither court of appeals analyzed the issue in terms of the distinction between direct and collateral attack (see *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 111 n.8), and subsequent decisions in each circuit strongly suggest that the courts might reach a contrary result if the issue were again presented. See *United States* v. *Tursi*, 576 F.2d 396, 399 (1st Cir. 1978); *Marshall* v. *United States*, 576 F.2d 160, 162 (9th Cir. 1978); *Hitchcock* v. *United States*, 580 F.2d 964, 966 (9th Cir. 1978). Thus, the Sixth Circuit is the only court of appeals to have acknowledged the difference between a direct and collateral attack on a guilty plea, to have found that the defendant suffered no prejudice as a result of a Rule 11 violation, and then to have granted Section 2255 relief.

We do not suggest, of course, that contentions relating to the taking of a guilty plea may never be asserted in a Section 2255 motion. A defect in the Rule 11 proceeding that is "fundamental" and that "inherently results in a complete miscarriage of justice" or presents "exceptional circumstances where the need for the remedy afforded by the unit of habeas corpus is apparent" would justify collateral relief. For example, where, as here, the violation relates to the trial judge's failure to notify the defendant of the mandatory special parole provisions, prejudice sufficient to warrant habeas corpus relief would be demonstrated by a showing that the defect in fact rendered the plea involuntary (for example, if the defendant would not have pleaded guilty had he been

aware of the special parole term)[14] or that it would be manifestly unfair, in light of the absence of an express warning about special parole, to hold him to his plea (for example, if the sentence imposed, with the addition of the period of special parole, exceeded the maximum sentence that the defendant was told he could receive).[15] See *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 111; *Bachner* v. *United States*, *supra*, 517 F.2d at 597.

Respondent's allegations satisfied neither of these tests. His motion to vacate sentence did not allege that he was actually unaware of the special parole provisions, much less that he would not have pleaded guilty if he had been fully informed at the Rule 11 proceedings of the consequences of his plea (see App. 11-13). Although the memorandum of law submitted in support of respondent's Section 2255 motion stated that "[d]efendant did not know of the mandatory special parole term" (App. 16), this allegation, unlike the contents of the motion, was not verified, and respondent did not offer to submit an affidavit

[14] A conviction entered upon an involuntary plea of guilty is subject to collateral attack. See *Henderson* v. *Morgan*, 426 U.S. 637, 645 (1976); *Fontaine* v. *United States*, 411 U.S. 213 (1973); *Machibroda* v. *United States*, *supra*, 368 U.S. at 493.

[15] In that circumstance, the proper remedy under Section 2255 would be to reduce the defendant's sentence to comport with the information he was given at the time of his plea. See *Richardson* v. *United States*, 577 F.2d 447, 452 (8th Cir. 1978), petition for cert. pending, No. 78-5263. Cf. *United States* v. *Sheppard*, 588 F.2d 917, 918 (4th Cir. 1978). Section 2255 allows a court, upon finding that "the sentence imposed was * * * open to collateral attack," to "correct the sentence as may appear appropriate."

to support the assertion. The allegation was suspect, in any event, in light of counsel's representation at the Rule 11 proceeding that he had explained to respondent the consequences of the plea (App. 9) and his acknowledgment at the hearing on respondent's motion to vacate sentence that, before a client pleaded guilty, it was his practice to explain to the client the possible sentences that could be imposed (App. 20-21).

The district court concluded that, "under that state of affairs," it could "infer that [the special parole term] was known to [respondent]" at the time of his plea (App. 23). More important, the court expressly found that the additional information would not have materially affected respondent's decision to enter into the plea agreement (Pet. App. 22a).[16] The court of appeals did not disturb this factual determination, which is amply supported by the record. As the Seventh Circuit has observed:

> Unlike ineligibility for parole, which "automatically trebles the *mandatory* period of incarceration which an accused would receive under normal circumstances," the mandatory parole term has no effect on that period of incarceration and does not ever become material unless the defendant violates the conditions of his parole.

[16] The district court remarked (App. 26): "I am sure that it would not have made one bit of difference to Mr. Timmreck if I had said to him in this case, 'You will be subjected to a parole term of at least three years,' as far as his guilty plea is concerned. * * * And what he was interested in, I'm sure, was what the term in prison would be."

> It would be as unrealistic, we think, to assume that he would expect to do so and be influenced by that expectation at the time he is considering whether to plead guilty, as it would be to assume that he would be influenced by other contingencies he is not advised about.

Bachner v. *United States*, *supra*, 517 F.2d at 597 (citation omitted). See also *Johnson* v. *Wainwright*, 456 F.2d 1200, 1201 (5th Cir. 1972) (likelihood that district court's mention of parole term would cause a defendant to change his decision to plead guilty "is so improbable as to be without legal significance"). Finally, as the district court noted (Pet. App. 18a), respondent's sentence of 10 years' imprisonment and five years' special parole was no greater—indeed, was materially less, for all practical purposes—than the term of 15 years' imprisonment that he was advised he could receive if he pleaded guilty. See *United States* v. *Turner*, 572 F.2d 1284, 1285 (8th Cir. 1978); *Bell* v. *United States*, 521 F.2d 713, 715 (4th Cir. 1975), cert. denied, 424 U.S. 918 (1976).

2. In these circumstances, with no finding that the district court's technical noncompliance with one aspect of Rule 11 rendered respondent's plea either involuntary or so unfair as to be "a complete miscarriage of justice," respondent was not entitled to relief under Section 2255. Indeed, the court of appeals conceded that the violation at issue here could not satisfy the traditional standard for issuance of the writ of habeas corpus (Pet. App. 9a). Nonetheless,

in an attempt to reconcile what it viewed as "somewhat contradictory language" in this Court's decisions restricting the scope of collateral attack for nonconstitutional errors in *Davis* and demanding strict adherence to the requirements of Rule 11 in *McCarthy* (*ibid.*), the court below concluded that "a Rule 11 violation is per se prejudicial and thus must be a 'fundamental defect which inherently results in a complete miscarriage of justice' " (*id.* at 10a-11a). Contrary to the court of appeals assumption, there is no tension between the standards for Section 2255 relief articulated in *Hill* and *Davis* and the prophylactic rule announced in *McCarthy* for noncompliance with Rule 11.

McCarthy, it bears repeating, arose on direct appeal and involved a seriously defective guilty plea proceeding (conducted just two weeks after the effective date of the 1966 amendments to Rule 11) in which the trial judge, in disregard of the Rule, had not even ascertained whether the defendant understood the charges against him. The "automatic reversal" remedy adopted by the Court was designed in large part to ensure scrupulous adherence to the new rule, which worked major, salutary changes in the plea-taking process in the federal courts by requiring personal interrogation of the defendant, on the record, about the voluntariness of and factual basis for his guilty plea.[17] The Court emphasized,

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[17] The Court observed (394 U.S. at 465; footnote omitted):

> [T]he procedure embodied in Rule 11 * * * is designed to assist the district judge in making the constitutionally required determination that a defendant's guilty plea is

however, that its decision was "based solely upon our construction of Rule 11 and * * * our supervisory power over the lower federal courts," rather than upon the Constitution. *McCarthy* v. *United States*, *supra*, 394 U.S. at 464. See *United States* v. *Watson*, 548 F.2d 1058, 1062 n.7 (D.C. Cir. 1977). Moreover, although the Court remarked that "prejudice inheres in a failure to comply with Rule 11" (394 U.S. at 471), it did not suggest that such prejudice—which was defined merely as "depriv[ing] the defendant of the Rule's procedural safeguards" (*ibid.*)—was of a magnitude sufficient to warrant habeas corpus relief. Indeed, strong evidence that the Court did not consider every plea entered in violation of Rule 11 to be fundamentally unfair is supplied by its decision not to apply *McCarthy* retroactively because of "the large number of constitutionally valid convictions that may have been obtained without full compliance with Rule 11." *Halliday* v. *United States*, 394 U.S. 831, 833 (1969).[18]

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truly voluntary * * * [and] is intended to produce a complete record at the time the plea is entered of the factors relevant to this voluntariness determination. Thus, the more meticulously the Rule is adhered to, the more it tends to discourage, or at least to enable more expeditious disposition of, the numerous and often frivolous post-conviction attacks on the constitutional validity of guilty pleas.

[18] In declining to hold *McCarthy* retroactive, the Court carefully drew a distinction between the remedies available for a violation of the Rule and for an involuntary guilty plea (*Halliday* v. *United States*, *supra*, 394 U.S. at 833):

> [A] defendant whose plea has been accepted without full compliance with Rule 11 may still resort to appropriate post-conviction remedies to attack his plea's voluntariness. Thus, if his plea was accepted prior to our decision in *McCarthy*, he is not without a remedy to correct constitutional defects in his conviction.

Hence, whatever the wisdom of continuing to reverse convictions on direct appeal, without a showing of prejudice, in order to encourage judges to comply precisely with the procedures outlined in Rule 11,[19]

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[19] Even on direct appeal, there is much to commend the view that the "automatic reversal" rule announced in *McCarthy* for every violation of Rule 11 has outlived its usefulness and that the harmless error rule of Fed. R. Crim. P. 52(a) should be applied to inconsequential Rule 11 violations. See *United States* v. *Scharf*, 551 F.2d 1124, 1129-1130 (8th Cir.), cert. denied, 434 U.S. 824 (1977); *United States* v. *Lambros*, 544 F.2d 962, 966 (8th Cir. 1976), cert. denied, 430 U.S. 930 (1977). But see, *e.g.*, *United States* v. *Palter*, 575 F.2d 1050 (2d Cir. 1978); *United States* v. *Adams*, *supra*, 566 F.2d at 964-965. Trial judges are now aware of their obligations under Rule 11, and reversals because of what are at most isolated and inadvertent errors in accepting a guilty plea no longer serve a substantial didactic function. What is more, the 1975 amendments to Rule 11 have added substantial baggage to a rule that previously had been limited to a few considerations essential to the establishment of a knowing and intelligent plea. Rule 11(c)(5), for example, now requires the court to inform a defendant "that if he pleads guilty * * * the court may ask him questions about the offense * * *, and if he answers these questions under oath * * *, his answers may later be used against him in a prosecution for perjury * * *." The Court certainly did not have this type of requirement in mind when it stated in *McCarthy* that "prejudice inheres in a failure to comply with Rule 11" (394 U.S. at 471), yet the lower courts have not hesitated to set aside convictions in reliance on *McCarthy* because of noncompliance with this portion of the rule. See *United States* v. *Boatright*, 588 F.2d 471 (5th Cir. 1979); *United States* v.

violations of the Rule do not present a circumstance in which "the need for the remedy afforded by the writ of *habeas corpus* is apparent." *Hill* v. *United States*, *supra*, 368 U.S. at 428. A trial judge's failure to mention the mandatory special parole term during the Rule 11 proceeding normally will be immediately obvious to the defendant upon imposition of sentence, especially if his ignorance of the special parole requirement truly played a meaningful role in his decision to plead guilty. When the period of special parole is announced, the defendant (if his later allegations are in fact true) should be instantly aware that he has been given a more severe sentence than he anticipated could be imposed. It is not unreasonable to hold that the remedy in that situation should be a timely motion to withdraw the plea under Fed. R. Crim. P. 32(d) or a direct appeal of the conviction.

Finally, even if the court of appeals' holding were not wholly inconsistent with the traditional limitations on the scope of collateral attack,[20] it would be

Boone, 543 F.2d 1090, 1092 (4th Cir. 1976). See also *United States* v. *Michaelson*, 552 F.2d 472, 477 (2d Cir. 1977); *United States* v. *Journet*, 544 F.2d 633, 636-637 (2d Cir. 1976).

[20] The court's conclusion that Section 2255 relief is necessary to "motivate strict compliance with Rule 11 in the future" (Pet. App. 12a) detaches the writ of habeas corpus from its historical moorings. The sole function of the writ is to test "the legality of the detention of one in the custody of another" (*McNally* v. *Hill*, 293 U.S. 131, 136 (1934); see also *Blackledge* v. *Allison*, *supra*, 431 U.S. at 72; *Harris* v. *Nelson*, 394 U.S. 286, 290-291 (1969)), not to establish prophylactic

unwise to extend the "automatic reversal" rule of *McCarthy* to Section 2255 proceedings, where the benefit of allowing review of Rule 11 errors "is small in relation to the costs." *Stone* v. *Powell*, *supra*, 428 U.S. at 493. Permitting a plea of guilty to be vacated years after it has been entered, for reasons unrelated to guilt, would provide incentives for defendants to scour the record of their Rule 11 proceedings for any colorable instance of noncompliance with the rule and to delay a request for relief until a time when the government may be unable to disprove allegations concerning distant events surrounding the plea or when a reprosecution n the underlying offense may be difficult or impossible. See *Henderson* v. *Kibbe*, *supra*, 431 U.S. at 154 n.13; *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 109; *United States* v. *Sobell*, 314 F.2d 314, 324-325 (2d Cir.), cert. denied, 374 U.S. 857 (1963).[21] The government's inability to retry a defendant who has obtained collateral relief (see page 25, *supra*) is even more likely to occur when the first conviction was based on a guilty plea, because of the lack of a trial

rules for the sound administration of the criminal law. A defendant, such as respondent, whose guilty plea was not influenced in any way by the district court's technical noncompliance with a rule of criminal procedure can hardly be said to be detained unlawfully.

[21] The court of appeals frankly acknowledged that "our decision 'erodes the principle of finality in criminal cases and may allow an obviously guilty defendant to go free'" (Pet. App. 11a, quoting *Del Vecchio* v. *United States*, *supra*, 556 F.2d at 109).

transcript. See Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments*, *supra*, 38 U. Chi. L. Rev. at 147. In sum, as the Court recently observed in *Blackledge* v. *Allison*, 431 U.S. 63, 71 (1977), "[m]ore often than not a prisoner has everything to gain and nothing to lose from filing a collateral attack upon his guilty plea."

Here, for example, it should have been obvious to respondent (and his counsel) at sentencing that the trial judge had neglected to mention the special parole requirement during the Rule 11 proceeding. Yet respondent's unexplained delay of almost two years in raising his objection will, if the court of appeals' decision is not overturned, require the government to reprosecute a complicated conspiracy case long after the occurrence of the criminal conduct, a task made especially burdensome by the fact that respondent's plea allowed him to avoid trial with his co-defendants. See *United States* v. *Barker*, 514 F.2d 208, 222 (D.C. Cir.) (en banc), cert. denied, 421 U.S. 1013 (1975).[22]

These important concerns would be seriously undermined if every violation of Rule 11, no matter how inconsequential, justified Section 2255 relief.[23] In-

[22] Twenty-two defendants were indicted in this case; 11, including respondent, pleaded guilty; five defendants were found guilty by a jury.

[23] The same concerns prompted the Court not to apply *McCarthy* retroactively, even to Rule 11 errors presented on direct appeal. See *Halliday* v. *United States*, *supra*, 394 U.S. at 833.

deed, as we have already noted (see page 33, note 19, *supra*), the problem will be exacerbated by the 1975 amendments to the Rule, which expand substantially the range of subjects on which a trial judge must advise a defendant before accepting his guilty plea. See Fed. R. Crim. P. 11(c)(1)-(5). More than 80% of all federal criminal convictions follow pleas of guilty,[24] and minor deviations from Rule 11 are inevitable in a not insignificant number of these cases. The strong societal interest in the finality of judgments suggests that, unless a violation of the Rule materially influenced the defendant's decision to plead guilty or would otherwise lead to "a complete miscarriage of justice," the technical error should be raised on direct appeal or not at all.

[24] In fiscal year 1977, 35,335 of the 43,248 federal convictions, or 81.7%, followed pleas of guilty. In fiscal year 1976, the figures were 33,327 out of 40,975, or 81.3%. Source: *1977 Annual Report of the Director of the Administrative Office of the United States Courts*, Table 38, at p. 143.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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FEBRUARY 1979

☆ U. S. GOVERNMENT PRINTING OFFICE: 1979 297512 342

FOR ARGUMENT

IN THE
SUPREME COURT
OF THE UNITED STATES

OCTOBER TERM 1978

#78-744

UNITED STATES OF AMERICA,
Petitioner,

-VS-

CHARLES TIMMRECK,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT

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COUNTER-STATEMENT OF THE QUESTION

Where the facts underlying a 28 USC §2255 motion to vacate indicate that at the time Respondent offered his guilty plea: (1) he indicated to the trial judge a lack of knowledge of the possible consequences of his plea; (2) the trial judge advised Respondent he "could serve as long as 15 years in jail" but, in violation of F R Crim P 11, failed to advise him that a custodial sentence on the offense to which he was pleading guilty must also include a special parole term of not less than three years in addition to whatever custodial sentence was imposed; and (3) because of the nature of the special parole term, the sentence imposed of ten years imprisonment and five years special parole actually subjected Respondent to potential combined prison and parole custody of virtually twenty years; where no other remedy is available; and where there has been no claim that: (1) Respondent would, in fact, have continued with his guilty plea had he been fully advised of its consequences; (2) Respondent, who was not advised of his right to appeal at the time of sentencing, deliberately bypassed his right to appeal; (3) the interval between the time of sentencing and the filing of the motion to vacate was for purposes of delay; or (4) the government's ability to prosecute anew has been in any way affected by that interval, Respondent is properly entitled to §2255 relief.

COUNTER-STATEMENT OF THE CASE

1. On May 24, 1974, Respondent Charles Timmreck pled guilty in the United States District Court for the Eastern District of Michigan to conspiracy to distribute a controlled substance in violation of 21 USC §846. At the time Respondent offered his guilty plea, he was questioned by the district judge as to his understanding of certain of the rights he was waiving. The judge stressed that "what I want to get at and be sure of is that you fully understand what you are doing" (A-3). He questioned Respondent and his counsel as to Respondent's understanding of his rights (A-4), and he asked Respondent about his understanding of the possible punishment involved. Respondent replied that he was *not* aware of the possible consequences of his plea:

> THE COURT: Now, if I accept your plea of guilty, Mr. Timmereck [sic], do you know what the possible consequences of a plea of guilty to Count I of this Indictment could be in terms of punishment?
>
> THE DEFENDANT: *No, sir.*
>
> THE COURT: Have you been told that you could serve as long as 15 years in jail and be subjected to a substantial fine, and I believe the fine is $25,000. Have you been told that?
>
> THE DEFENDANT: *I have now, yes.*
>
> THE COURT: *Now you know?*
>
> THE DEFENDANT: *Yes, sir.*
>
> (A-4-5) (emphasis added)

At no time during the hearing did the court advise Respondent that a custodial sentence for the offense to which he was pleading would also require a mandatory special parole term of at least three (3) years or up to life or that violation of the special parole term at any point during the term could result in imprisonment for the entire term of

the special parole and not just the unexpired portion. At the conclusion of the hearing, the court accepted Respondent's plea (A-9-10).

2. On September 19, 1974, Respondent was sentenced to ten (10) years imprisonment, a five thousand ($5,000.00) dollar committed fine and a special parole term of five (5) years. At the time of sentencing, Respondent was not advised of his right to appeal.

3. On September 13, 1976, pursuant to the provisions of 28 USC §2255, Mr. Timmreck filed an Amended Motion to Vacate Guilty Plea, alleging that his plea had been accepted in violation of F R Crim P 11 for the reason that the district judge had failed to advise him of the mandatory special parole provisions of 21 USC §841(b) accompanying any prison sentence for violation of 21 USC §846. Although the government opposed Respondent's Motion, it made no claim that Respondent would have continued with his plea had he been fully advised of its consequences, that Respondent deliberately bypassed his right to appeal, that the interval between the time of sentencing and the time of filing the motion was for purposes of delay, or that the government's ability to prosecute anew was in any way affected by the interval.

After hearing and oral argument, on December 3, 1976, the district judge entered an Opinion and Order denying Respondent's motion. 423 F Supp 537.

On June 12, 1978, the Court of Appeals for the Sixth Circuit reversed the judgment of the district court and remanded the cause with instructions to vacate the sentence entered upon the guilty plea and allow Respondent to plead anew. 577 F2d 372.

On January 8, 1979, this Court granted certiorari. US , SCt , 59 LEd2d 30.

This is the Brief of Respondent.

SUMMARY OF ARGUMENT

28 USC §2255, "the judicial method of lifting undue restraints upon personal liberty," exists to provide a flexible means of providing substantive justice for persons held in federal custody in violation of the Constitution or laws of the United States. In the absence of harmless error or deliberate bypass of the right to appeal, its availability is not reduced by the non-constitutional basis of a claim for relief.

Because of the extent to which the federal system relies on guilty pleas to conclude criminal prosecutions, maintenance of the principles underlying the adversary system requires that the system's interest in finality of judgments be secondary to insuring the availability of relief for persons prejudiced by errors at their guilty plea hearings. While §2255 relief is only appropriate where the error involved is a fundamental defect, a non-harmless violation of F R Crim P 11 is such a defect, entitling a §2255 petitioner to relief.

Requiring a §2255 petitioner to show particular prejudice before relief will be granted would impose an almost impossible burden and would involve the district courts in subjective, highly speculative and time-consuming litigation unlikely to produce effective or uniform enforcement of Rule 11.

As of fiscal 1978, §2255 motions constituted only 1.4% of the civil caseload of the district courts, the number of such motions filed increasing only 5.6% over the past four years. During the same period, the total number of civil cases filed increased 34%.

Respondent, who at the time of offering his plea advised the district judge of his unawareness of the consequences of his plea, was in fact prejudiced by the district judge's failure to advise him concerning the mandatory special parole term. The sentence imposed subjected Respondent to a potentially greater term of total custody than he was advised. Respondent was not advised of his right to appeal, there has

been no claim of deliberate bypass of the right to appeal or purposeful delay in requesting §2255 relief, and the government has neither claimed nor established harm to its ability to prosecute anew upon the granting of §2255 relief. Respondent is properly entitled to §2255 relief.

ARGUMENT

WHERE THE FACTS UNDERLYING A 28 USC §2255 MOTION TO VACATE INDICATE THAT AT THE TIME RESPONDENT OFFERED HIS GUILTY PLEA: (1) HE INDICATED TO THE TRIAL JUDGE A LACK OF KNOWLEDGE OF THE POSSIBLE CONSEQUENCES OF HIS PLEA; (2) THE TRIAL JUDGE ADVISED RESPONDENT HE "COULD SERVE AS LONG AS 15 YEARS IN JAIL" BUT, IN VIOLATION OF F R CRIM P 11, FAILED TO ADVISE HIM THAT A CUSTODIAL SENTENCE ON THE OFFENSE TO WHICH HE WAS PLEADING GUILTY MUST ALSO INCLUDE A SPECIAL PAROLE TERM OF NOT LESS THAN THREE YEARS IN ADDITION TO WHATEVER CUSTODIAL SENTENCE WAS IMPOSED; AND (3) BECAUSE OF THE NATURE OF THE SPECIAL PAROLE TERM, THE SENTENCE IMPOSED OF TEN YEARS IMPRISONMENT AND FIVE YEARS SPECIAL PAROLE ACTUALLY SUBJECTED RESPONDENT TO POTENTIAL COMBINED PRISON AND PAROLE CUSTODY OF VIRTUALLY TWENTY YEARS; WHERE NO OTHER REMEDY IS AVAILABLE; AND WHERE THERE HAS BEEN NO CLAIM THAT: (1) RESPONDENT WOULD, IN FACT, HAVE CONTINUED WITH HIS GUILTY PLEA HAD HE BEEN FULLY ADVISED OF ITS CONSEQUENCES; (2) RESPONDENT, WHO WAS NOT ADVISED OF HIS RIGHT TO APPEAL AT THE TIME OF SENTENCING, DELIBERATELY BY-PASSED HIS RIGHT TO APPEAL; (3) THE INTERVAL BETWEEN THE TIME OF SENTENCING AND THE FILING OF THE MOTION TO VACATE WAS FOR PURPOSES OF DELAY; OR (4) THE GOVERNMENT'S ABILITY TO PROSECUTE ANEW HAS BEEN IN ANY WAY AFFECTED BY THAT INTERVAL, RESPONDENT IS PROPERLY ENTITLED TO §2255 RELIEF.

The relief available to federal prisoners pursuant to 28 USC §2255 exists to help insure the capacity of the legal system to provide substantive justice. Along with its common law antecedent writ of habeas corpus, §2255 has become "the judicial method of lifting undue restraints upon personal liberty." *Price* v *Johnston*, 334 US 266, 269, 78 SCt 1049, 92 LEd 1356, 1361 (1948). While most frequently utilized to challenge the constitutionality of restraint, its uses are flexible.

As described by Mr. Justice Frankfurter in dissent in *Sunal* v *Large*, 332 US 174, 187, 67 SCt 1588, 91 LEd 1982, 1991-1992 (1947), the writ is

> "a swift and imperative remedy in all cases of illegal restraint" . . . fluid and free from the definiteness appropriate to ordinary jurisdictional doctrines. (citation omitted)

The "well-worn formula[e]" that habeas corpus "will not be allowed to do service for an appeal," *Sunal* v *Large*, *supra*, 332 US at 178, 91 LEd at 1986, and that not every asserted error of law may be raised on a §2255 motion, cf. *Hill* v *United States*, 368 US 424, 82 SCt 468, 7 LEd2d 417 (1962), have generally been held to bar relief only where the right to appeal has been deliberately passed up, e.g., *Sunal*, *supra*, or where the error was harmless to the accused, e.g., *Hill*, *supra*. See also Note, "Developments in the Law—Federal Habeas Corpus," 83 Harv L Rev 1038, 1067-1068 (1970). Where such circumstances are absent, relief may not be denied merely because the violation asserted is non-constitutional in origin. As this Court stated in *Davis* v *United States*, 417 US 333, 345, 94 SCt 2298, 41 LEd2d 109, 118 (1974):

> There is no support in the prior holdings of this Court for the proposition that a claim is not cognizable under §2255 merely because it is grounded in the "laws of the United States" rather than the Constitution.

Where the error alleged is of significance to the legal system as a whole, there is particular reason for §2255 relief to be available.

Because the strength of our system of criminal law is directly proportional to the degree to which the presumption of innocence is protected at trial, the practice of concluding most criminal prosecutions by pleas of guilty potentially threatens the foundations of the adversary process. As this Court noted in *McCarthy* v *United States*, 394 US 459, 463, 89 SCt 1166, 22 LEd2d 418, 424 (1969) at n7, the vast majority of federal prosecutions are resolved by pleas of guilty. In fiscal 1978, for example, 85.2% of all federal convictions were obtained by pleas of guilty or nolo contendere. *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 114; see also figures for fiscal 1977 and 1976, Brief for the United States at 37, n24.

Offering a plea of guilty relieves the government of its burden of proof, as the defendant expressly or impliedly waives all of her or his constitutional, statutory and court-rule-created rights and convicts himself or herself out of her or his own mouth. As such, the "fairness and adequacy of the procedures on acceptance of pleas of guilty are of vital importance in according equal justice to all" accused persons. *Notes of the Advisory Committee on 1966 Amendments to F R Crim P.*

In addition, because F R Crim P 32(a) (2) does not require the sentencing judge to advise a defendant who has pled guilty of the right to appeal, the likelihood of correction on direct appeal of errors committed at guilty plea hearings is reduced, and the potential threat to the system is enhanced.

For these reasons, maintenance of a forum for the correction of errors committed at guilty plea hearings is of particular significance to the legal system.

In order for a guilty plea to be voluntary, the accused must be "fully aware of the direct consequences" of the plea, *Brady* v *United States*, 397 US 742, 755, 90 SCt 1463, 25 LEd2d 747, 760 (1969), including not only the maximum sentence and fine to which he or she is exposed but also any applicable mandatory special parole term.[1] This follows because the special parole term is a " 'factor that necessarily affects the maximum term of imprisonment.' " *Bunker* v *Wise*, 550 F2d 1155, 1158 (9th Cir 1977), citing *United States* v *Myers*, 451 F2d 402, 404 (9th Cir 1972).

The mandatory special parole term, whose "nature and operation . . . are very different" from traditional parole, *Bunker* v *Wise, supra*, 550 F2d at 1158, "place[s] a number of onerous burdens on the liberty of paroled individuals," *United States ex rel. Baker* v *Finkbeiner*, 551 F2d 180, 184 (7th Cir 1977), and substantially enhances the total possible period of incarceration faced by a plea-offering defendant. Depending on the nature of the offense involved, it must be for at least two or three years in length, 21 USC §841(b) (1) (A) and (B), and it may be for as long as life. Cf., e.g., *United States* v *Rea*, 532 F2d 147 (9th Cir 1976). Violation of the special parole term at any point during the term potentially subjects the defendant to incarceration for the entire period of the special parole term. 21 USC §841(c). Moreover, the risk of further incarceration is significant: "[A] substantial number of parolees . . . return to prison for parole violations. Many of these violations are inevitably technical rather than criminal." *United States ex rel. Baker* v *Finkbeiner, supra*, citing *President's Commission on Law Enforcement and Justice, Task Force Report: Corrections* (1967) at 62 and Note, "Parole: A Critique of Its Legal Foundations and Conditions," 38 NYU L Rev 702, 721 (1963).

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[1]The government concedes the special parole term to be a "consequence of the plea" within the meaning of Rule 11 as then in effect. Brief for the United States at 13.

For these reasons, failure to advise an accused of the mandatory special parole term accompanying any custodial sentence for violation of 21 USC §846 deprives the accused of highly significant information relative to the potential term of imprisonment faced and fundamentally undercuts the voluntariness of his or her plea.

Similar to its argument in this case, the government argued in *McCarthy* that substantial compliance with the provisions of F R Crim P 11 ought to be a sufficient record of voluntariness in the absence of a showing of prejudice by the defendant. This Court rejected that argument, holding that

> *prejudice inheres in a failure to comply with Rule 11*, for noncompliance deprives the defendant of the Rule's procedural safeguards that are designed to facilitate a more accurate determination of the voluntariness of his plea. 394 US at 471-472, 22 LEd2d at 428 (emphasis added)

The Court also stressed that requiring a showing of prejudice would involve the courts in an after-the-fact fact-finding process in a " 'highly subjective area' " and would encourage unwarranted speculation as to whether the defendant's plea was otherwise truly voluntary. 394 US at 469-471, 22 LEd2d at 427-428.

Relying on *Davis* v *United States, supra*, the government now argues that regardless of *McCarthy*, a showing of particular prejudice ought to be required in collateral attacks to federal guilty pleas. The government's reliance on *Davis* is misplaced.[2]

[2]In support of its argument, the government attempts to align the Third Circuit with those circuits supporting its position. Brief for the United States at 26-27, n13. To the contrary, *Horsley* v *United States*, 583 F2d 670 (3d Cir 1978), cited by the government, makes clear that the Third Circuit's interpretation of *Davis* is virtually identical with that of the Sixth Circuit in the instant case.

The government is also in error in suggesting, *Id.*, that *United States* v *Tursi*, 576 F2d 396 (1st Cir 1978), *Marshall* v *United States*, 576 F2d 160 (9th Cir 1978), and *Hitchcock* v *United States*, 580 F2d 964 (9th Cir 1978), (Continued on page 11)

Davis involved a §2255 challenge to a conviction coming after a trial, with Davis' claim based on an intervening change in the law. Echoing the language of prior cases, cf., e.g., *Hill* v *United States, supra*, 368 US at 428, 7 LEd2d at 421, and cases cited therein, this Court held that in such a case, the "appropriate inquiry" is "whether the claimed error of law was a 'fundamental defect which inherently results in a complete miscarriage of justice' . . . 'and presents exceptional circumstances where the need for the remedy afforded by the writ of habeas corpus is apparent.' " 417 US at 346, 41 LEd2d at 119.

Where a trial has occurred, the defendant has been convicted in an adversary proceeding by evidence presented by the government in open court. Presumably, all pre-trial and trial issues of law and fact have been determined after a full hearing at which the defendant has been represented by counsel competent and eager to attack, weaken and discredit the government's case. The defendant has confronted his or her accusers in open court and subjected them to probing cross-examination, and he or she may have offered exculpatory evidence as well. Because of the more thorough and protracted fact-finding process, less errors are likely to have been prejudicial.

In addition, the *Davis* test is substantially parallel to the "plain error" rule of F R Crim P 52(b) governing reversal on direct appeal in cases where no objection has been made at trial. Cf., e.g., *United States* v *Atkinson*, 297 US 157, 160, 56 SCt 391, 80 LEd 555, 557 (1936); *Kyle* v *United States*, 402 F2d 443 (5th Cir 1968); *Harris* v *United States*, 297 F2d 491 (8th Cir 1961); *Jackson* v *United States*, 179 F2d 842 (6th Cir 1950). *Davis*, therefore, does not create a new standard on collateral review where no objection has been made. Since cases involving guilty pleas almost invariably do not include

none of which involves a failure to advise a guilty-pleading defendant of the penal consequences of his or her plea, in any way foreshadow a change of position on the issue at bar by either the First or Ninth Circuit. Cf. *United States* v *Yazbeck*, 526 F2d 641 (1st Cir 1975); *Bunker* v *Wise*, 550 F2d 1155 (9th Cir 1977).

an objection at the trial court level, *Davis* cannot reasonably be argued as creating a new standard of review for collateral challenges to guilty pleas. Reevaluation of prior decisions on the basis of *Davis* is, therefore, unnecessary.

Rather, because of the different circumstances surrounding a defendant who has pled guilty, and because of the large incidence of guilty pleas in the federal system, procedures which do not insure meticulous compliance with Rule 11 threaten the requirement of thorough, knowing voluntariness and consequently jeopardize the integrity of the adversary process itself. In the absence of a showing of harmlessness,[3] a defect in a guilty plea is in and of itself sufficiently prejudicial to require the granting of collateral relief.

Requiring a petitioner to show particular prejudice would be unsound. While an objective standard may sometimes require the granting of relief in a case where a plea might nevertheless have been offered, it is the only way of insuring that relief will be granted in all cases where the plea would not have been offered. As Judge Boreman noted for the Fourth Circuit in *Paige* v *United States*, 443 F2d 781, 783 (4th Cir 1971):

> . . . there is no way by which the effect of the court's misleading statement upon the voluntariness of Paige's guilty plea could be determined. Whether Paige would have elected to plead not guilty and put the government to proof of his guilt had he known the full consequences of pleading guilty to a second narcotics offense is a matter of pure speculation.

See also *McCarthy*, *supra*, 394 US at 465, 22 LEd2d at 425; *United States* v *Yazbeck*, 524 F2d 641, 643-644 (1st Cir

[3]Cf., e.g., *Hill* v *United States*, *supra* (motion treated as Rule 35 motion to correct sentence; violation of F R Crim P 32(a) not inherently prejudicial; no prejudice alleged); *United States* v *Ortiz*, 545 F2d 1122 (8th Cir 1976) (prosecutor advised defendant of mandatory special parole term in the presence of the court).

1975); *Bell* v *United States*, 521 F2d 713, 716-717 (4th Cir 1975) Widener, J., concurring and dissenting.

Carrying the burden of showing prejudice would also be "an almost impossible task". *United States* v *Carper*, 116 F Supp 817, 820 (DDC 1953) (re violation of F R Crim P 6(d)). Accused persons plead guilty for many reasons, some of them bizarre and irrational to judges and counsel regularly involved in the criminal process. In some cases, defendants would, in fact, have decided to proceed to trial if they had known the additional possible prison time faced for violation of special parole, but in most of those cases, they may be unable to establish that that lack of knowledge was critical to their decision to plead guilty.

In addition, then-District Judge, now-Circuit Judge Tamm, noted in *Carper*, *supra*, that a requirement of showing prejudice would also

> undermine the purpose, effectiveness and value of the Criminal Rules by judicial legislation which, in effect, would be saying that the Rules do not mean what they clearly and unequivocally state. *Id.*, 116 F Supp at 819

It would also make more difficult the achievement of uniform federal criminal procedure. *Id.*, 116 F Supp at 821.

For reasons similar to those indicated above, the time lapse between time of sentencing and time of filing a §2255 petition is immaterial to the question before the Court. Any number of valid reasons lie behind delays in bringing §2255 petitions, including lack of understanding of one's legal rights. Cf. F R Crim P 32(a)(2). Perhaps more importantly, though, Congress has expressly elected not to set a limit on the time within which such a petition may be filed. In the absence of a statutory change, this Court should not impose a limitation where Congress has chosen to impose none.[4, 5]

[4]An unsuccessful effort to impose a time limit was, in fact, made by Representative Sumners of Texas, who introduced HR 6723 during the

(Continued on page 14)

As Chief Justice Burger stressed while a circuit judge, dissenting in *Bostic* v *United States*, 298 F2d 678, 681 (DC Cir 1961),

> . . . passage of time, whether five years or twenty-five years, cannot affect valid claims under §2255. That is what Congress meant and that is as it should be.

See also *Brown* v *Allen*, 344 US 443, 500, 73 SCt 397, 97 LEd 469, 511 (1953).

While the availability of §2255 relief cuts against the system's interest in finality, "arrayed against [this] interest . . . is the very purpose of the writ of habeas corpus—to safeguard a person's freedom from detention in violation of constitutional [or legal] guarantees." *Blackledge* v *Allison*, 431 US 63, 72, 97 SCt 1621, 52 LEd2d 136, 146 (1977). Moreover,

> [a]dmirable as may be the effort toward system, this last resort for human liberty cannot yield when the choice is between tolerating its wrongful deprivation and maintaining the systemist's art.
>
> . . . Beside executing its great object, . . . considerations of economy of judicial time and

1946 session of Congress while consideration was pending of proposals eventually leading to 28 USC §§2254 and 2255. That bill would have imposed a filing deadline of one year after either the passage of the act, the discovery by the movant of the facts relied upon for relief or a change in the law relied upon for relief.

[5]The government's suggestion that a defendant who has just been sentenced "should be instantly aware" that he or she has been given an unexpectedly severe sentence and should, therefore, be required either to file a Rule 32(d) motion to withdraw the plea or take a direct appeal, Brief for the United States at 34, is palpably unrealistic. Regardless of whether imprisonment is anticipated, after sentence is imposed a person sentenced to a lengthy term of custody cannot reasonably be expected immediately to focus on, comprehend and develop legal strategy concerning a special parole term.

> procedures, important as they undoubtedly are, become comparatively insignificant. *Sunal*, *supra*, 332 US at 188-189, 91 LEd 1992-1993, Rutledge, J., dissenting.

See also Note, 83 Harv L Rev, *supra*, at 1058.

An objective test also furthers, rather than hinders, the objective of finality and produces less, rather than more, litigation. By adhering to an objective standard, lower courts are relieved of time-consuming hearings on the question of prejudice. Counsel for both parties are readily able to determine whether an asserted violation is meritorious. Where an objective test is applied, government attorneys also have a greater incentive to be fully attentive at guilty plea proceedings and to advise the court of any failures or omissions in the guilty plea record. Cf. *United States* v *Timmreck*, *supra*, 577 F2d at 377. Addressing itself to this point, the Third Circuit recently concluded,

> we do not believe the interests of justice are served by tolerating or condoning failure to implement Rule 11. Strict and consistent adherence to the requirements of Rule 11 will facilitate disposition of post-conviction assertions of error in the change of plea proceeding because the record will provide a clearer answer to any objections raised. *Horsley* v *United States*, 583 F2d 670, 675 (3d Cir 1978).

It is also significant that the number of §2255 motions filed is small enough not to generate administrative difficulties. In 1978, §2255 motions accounted for only 1.4% of the total civil actions commenced in the district courts. In the past four fiscal years the number of §2255 motions filed has increased only 5.6%, 1,822 in 1974 to 1,924 in 1978.[6] In contrast, the 138,770 civil cases filed in fiscal 1978 represented a 34% increase over the 103,530 cases filed in

[6]These figures include all motions to vacate, those based upon convictions following trials as well as those based upon guilty pleas.

1974.[7] Additionally, only 343 appeals from decisions on §2255 motions were filed in the courts of appeals in 1978, 2.2% of all cases appealed. *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 46, 60, 76.

Nor is reduction of the sentence to comport with the advice given at the time of the plea an adequate remedy. Cf. Brief for the United States at 28. n15. "Rule 11 entitles the accused to know the consequences of his guilty plea *prior* to the time of entering it so that he might accurately assess such consequences in making his determination," *United States* v *Smith*, 440 F2d 521, 526 (7th Cir 1971), and the legal basis of the plea itself is vitiated by the failure fully to advise the accused of his or her plea's consequences. Because the nature and conditions of the special parole term are unique, their impact on the decision to plead guilty ought not be underestimated. Cf. *Paige* v *United States*, *supra*. Moreover, reduction of the sentence would frustrate the intent of Congress that a special parole term shall follow any custodial sentence imposed for violation of 21 USC §846.

The error involved here was neither merely technical nor harmless to Mr. Timmreck: the prejudice was not only "inherent," it was actual. At the time he appeared before the district judge to offer his plea, Mr. Timmreck clearly did not know the consequences of his plea (A-4-5).[8] Advised only of

[7]By way of further contrast, over the same period of time the percentage of social security cases increased 77% (3,585 to 9,950), the percentage of mortgage foreclosure cases increased 42% (2,938 to 4,159), and the percentage of labor cases increased 38% (5,400 to 7,461). *1978 Annual Report of the Director of the Administrative Office of the United States Courts* at 60.

[8]Toward the conclusion of the guilty plea hearing the trial judge asked defense counsel whether counsel was of the opinion that Mr. Timmreck "knows full well the consequences of a plea might be," to which counsel replied, "That's correct" (A-9). At the September 8, 1976, hearing on Respondent's motion to vacate the district judge asked counsel whether he had discussed with Mr. Timmreck the provisions of the special parole term. Although agreeing with the court that it was not a part of his custom

(Continued on page 17)

a possible prison sentence of fifteen years plus a fine, he was, in fact, given a sentence exposing him to potential combined prison and parole custody of virtually twenty years[9] plus a fine. His plea was offered on the basis of a significant misunderstanding generated by the trial judge, and it is mere speculation that he would have continued to offer his plea had he been accurately informed of its consequences.

At the time of sentencing, Mr. Timmreck was not advised of his right to appeal, and there is no claim on this record that he either knew of or deliberately bypassed that right. Similarly, there has been no claim that the interval between the time of sentencing and the time of filing the motion to vacate was for purposes of delay.

The government has not claimed or demonstrated an inability to prosecute anew, and given that the bulk of its evidence was obtained through court-approved electronic surveillance, cf. *United States* v *Schebergen*, 353 FSupp 932 (ED Mich 1973) [Mr. Schebergen was the first-named defendant in this case.], it is highly unlikely that re-prosecution would be impaired.

For all these reasons, the error involved here was neither technical nor harmless but was a fundamental defect in the

not to explain to a client the sentencing implications of a guilty plea, counsel stated that he could not recollect whether he had expressly advised Mr. Timmreck of the special parole requirements involved here (A-20-21).

The government alleges that these statements establish the violation to have been technical. It is clear, however, that Mr. Timmreck's counsel did not recall whether he had advised Mr. Timmreck of the special parole term. Additionally, even if counsel had so advised Mr. Timmreck, it is also clear that at the time Respondent appeared in court to offer his guilty plea, he was, in fact, unaware of the consequences of his plea (A-4-5).

[9]On the sentence imposed, Mr. Timmreck was, in fact, subject to ten years initial imprisonment, four years, eleven months and twenty-nine days special parole supervision and five years imprisonment for violation of the special parole term, a combined prison and parole custody of twenty years less one day.

proceedings below and Mr. Timmreck is properly entitled to §2255 relief.

CONCLUSION

For all the reasons stated above, the decision of the Court of Appeals should be affirmed or, in the alternative, the writ of certiorari should be dismissed as improvidently granted.*

Respectfully submitted,

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Dated: March 28, 1979

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*In the event the judgment of the Court of Appeals is not affirmed, Respondent should be entitled to an opportunity to allege and establish the facts necessary to warrant the granting of his motion.